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Aug. 3

REPORTS
OF
CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS

COURT OF ERRORS
LAW SCHOOL
OF
LIBRARY
SOUTH-CAROLINA,

FROM DECEMBER, 1838, TO MAY, 1839,
BOTH INCLUSIVE.

BY WILLIAM RICE,
STATE REPORTER.

VOL. I.

CHARLESTON:
PRINTED BY BURGESS & JAMES,
East-Bay-street.
1839.

Entered according to the Act of Congress, in the year one thousand eight hundred and thirty-nine, by WILLIAM RICE, in the Clerk's office of the District Court of South-Carolina.

ADVERTISEMENT.

It is proper in submitting this volume of Reports to the public, that they should be apprised of the character and extent of the duties of the office of Reporter, in order that they may form a correct judgment of the manner in which these duties have been discharged. The Reporter in this State, is elected annually by the Legislature. The present incumbent was elected to the office at the close of the session of the legislature in December, 1838. By an act of the legislature of the same session, (appropriation act, p. 9,) "the sum of fifteen hundred dollars is appropriated for the salary of the State Reporter, of which sum, (the act provides,) not more than one half shall be paid, unless the said Reporter shall print and publish *such decisions of the Courts of Appeals and of Errors, which may be made during his term of office, as the judges may direct, within twelve months after they shall have been rendered.*" It will be perceived by this, that so far as the duties of the office are defined by the legislature, the reporter is *required* to print and publish *such decisions* only of the courts as the judges *may direct*. The selection of the cases for publication, it will be seen, devolves entirely upon the judges, who in fact always designate the cases to be reported. It follows, therefore, that whether the cases are more or less interesting or important, no responsibility *on that account* rests upon the reporter. This, although generally known, perhaps, to the profession in the State, is not probably known out of it, and the explanation is thought necessary, to define where the true responsibility of the reporter commences. In becoming a candidate for the office he now holds, the incumbent may be permitted to say, that he did so under an impression that the duties were arduous, and that a thorough and faithful discharge of them would involve a very large appropriation of time and labor, which under the present salary of the office, would not, and could not, be at all compensated. He determined, however, that while he should hold the office, he would spare no pains in endeavoring to discharge its duties to the satisfaction of the profession. How far he may have succeeded in his endeavors, it will be for them and the public to determine. The reporter has found upon experience, that he scarcely estimated the extent of the labor required and the large portion of time necessary to the preparation and publication of the reports; especially to their publication within the State. It will be observed, that the reporter is required to publish the decisions of both the Courts of Appeals, that is, the decisions of the Court of Appeals in *Equity*, as well as of the *Law* Court, and the decisions of the *Court of Errors*. The present volume contains the decisions of

the *Law Court of Appeals*, from December term, 1838, to the last or May term, 1839, and the decisions of the *Court of Errors*, during the same period, of cases brought into that court from the courts of law. The decisions pronounced by the *Court of Appeals in Equity*, during the same period of time, will be published in a separate volume, to which will be added the decisions of the *Court of Errors*, of such cases in chancery as have been decided in that court.

It will be observed that the arguments of counsel have been given but in a very few cases. Where they do appear, they have been furnished to the Reporter in writing, through the Clerks of the Court of Appeals, with the other papers in the cause to which the argument belongs. The Reporter is aware how very desirable it would be to give an abstract of the arguments of counsel in each case, but as to a great portion of the cases embraced in this volume, it was impossible he should do so. A large portion of the cases was argued and decided before he came into office; and however desirable it may be to give the arguments of counsel, it is to be remembered that the *decisions* alone are *required* to be published, and that if the Reporter *loses* rather than *gains* any thing by his *present* labors, it is scarcely to be expected he should voluntarily incur *further* loss. The truth of the matter is, that the salary allowed the Reporter, barely covers the expense of *printing*—and that at the end of the year, he finds himself, after having devoted his time almost exclusively to the arduous duties of his office, the proprietor of a small edition of law books, which small as it may be, he cannot hope to dispose of under many years. It must be borne in mind that the whole number of the profession in this State, does not exceed three hundred, and that many of them do not purchase even our own books of reports. The small number of the profession in this State, and the very limited demand for our books of reports, creates a striking difference between the office of reporter in this State, and the same office in larger and more populous ones, where the demand for his books may be so extensive as to be a source of considerable emolument. Under such circumstances, it would be scarcely fair to require or expect from any member of the profession, engaged in its practice, who may hold the office of reporter, a work of that perfectness and finish, which a more liberal and just compensation for his labors might induce, and would *enable*, the incumbent to attain. Something like a fair and adequate remuneration for the time and labor, (to say nothing of the learning and skill,) employed in the preparation and publication of the reports, would enable the reporter to devote his time and attention more exclusively to the undertaking, and would repair the *loss* which he must otherwise *necessarily sustain* in the business of his profession. These remarks are not made with a view to any individual interest of the present incumbent, but were thought necessary to a proper explanation of the duties and present state of the office of reporter. If they should be thought worthy of consideration, and be the means of conducing to the establishment of the office upon a better and more permanent footing, and while doing an act of justice to the incumbent, (whoever he might be,) should in this way insure what might reasonably be expected from the change, books of reports of a higher order of merit, and more extended use and authority, than can be

looked for under the present system, the *present* reporter will be amply content with the *same* gratification it would afford in *common* to every member of the profession.

In the general arrangement of the materials of the present volume of reports, the reporter has followed for the most part, the plan adopted by his predecessors in the office, though he cannot flatter himself that in the more material part of his duty, that of analysing the cases and giving a condensed statement of the principles established in them, he has attained any thing like the accuracy and precision of some of them. Where the cases have turned upon some definite points of fact, or principles of law, the reporter has, he hopes, succeeded in abstracting the true points decided; but he found, that in relation to some of the cases turning upon a long series of facts, where no precise principle of law seemed to be involved, any short abstract of the case was impracticable, and he has been obliged to give a statement of the whole case, (condensed when and as much as possible,) and the *result*. This remark applies particularly to the cases of *Capers v. Fripp*, p. 224, and *Wagner et al. v. Aiton*, p. 100, and perhaps partially to some others not now recollected. There will no doubt be found some mistakes, and particularly in relation to the names of persons, resulting from the obscurity of some of the copy furnished to the reporter. In most of the cases, the names of the counsel of both parties are given, and where none are given, or but one, it is to be attributed to an omission in the manuscript furnished, and not to any carelessness on the part of the reporter. Indeed, the illegibility of the copy furnished the reporter, adds very much to his difficulties, and sometimes occasions serious embarrassments and delay in the progress of his work. It is believed, however, that fewer errors have occurred on this account, than to any one, who should see the materials in manuscript, would appear possible; and that none of any very serious magnitude have escaped correction.

The cases decided in the Court of Errors are to be found at pages 383 and 459. They were intended to have been placed together at the end of the volume, but owing to circumstances which are explained at pages 430 and 457, some discrepancy in the order of these cases, as also those of the Columbia, May Term, of the Court of Appeals, has occurred.—As the Court of Errors is of recent origin, it may not be out of place to give some explanation of its organization and authority. It may be necessary to the information of the professional reader, out of this State (if there should be any) to remark, that there are two separate and independent tribunals in this State, one of *Law* and one of *Equity*: that in each department the Judges, when convened, constitute a *Court of Appeals*, in which all cases are finally determined, those of law in the *Law Court of Appeals*, and those of Equity in the *Court of Appeals in Equity*. To prevent, however, any clashing in the decisions of the two Courts, upon principles common to both, to insure entire uniformity and consistency in the interpretation of the laws, as well as to secure in important cases a more learned and intelligent tribunal than either of the Courts of Appeals would separately afford, it is provided by an act of the legislature of 1836, p. 40, (among other things,) “that upon all constitutional questions arising out of the con-

stitution of this State or of the United States, an appeal shall lie to the *whole* of the Judges assembled to hear such appeals; that an appeal shall also lie to the *whole* of the Judges upon all questions upon which either of the Courts of Appeals shall be divided, or when any two of the Judges of the Court shall require that a cause be further heard by all the Judges." Thus it is seen, that the Court of Errors, in this State, the highest legal tribunal, and the one of last resort in any case, is composed of the *Equity* and *Law* Judges united in one body, and brings to the ultimate and final decision of important questions all the *judicial* learning and experience of the State. Its decisions, therefore, are not only of paramount authority with us, but when regard is had to the number and character of the Judges who compose the Court, it might be supposed to present a legal tribunal which would not suffer in comparison with any other in this country.

The Reporter having now made all the explanations he thought proper to the occasion, submits this portion of his labors to the judgment of a liberal and enlightened profession, and while he feels sensible that he has not attained the accuracy and precision so desirable in a book of reports, he flatters himself, that under the circumstances, he will be found to have discharged his duties as well as could have been reasonably expected, and trusts that the result may prove acceptable to the bench and the bar, though it should not prove eminently creditable to the reporter.

SEPTEMBER, 1839.

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD
COMPRISED IN THIS VOLUME.

Chancellors and Judges of the Court of Appeals in Equity.

Hon. DAVID JOHNSON,
Hon. WILLIAM HARPER.
Hon. JOB JOHNSTON.
Hon. B. F. DUNKIN.*

Judges of the Courts of Sessions and Common Pleas, and of the Law Court of Appeals.

Hon. RICHARD GANTT,
Hon. JOHN S. RICHARDSON,
Hon. JOHN B. O'NEALL,
Hon. JOSIAH J. EVANS,
Hon. BAYLIS J. EARLE,
Hon. A. P. BUTLER.

Attorney General.

HENRY BAILEY, Esquire.

Solicitors.

Northern Circuit, T. J. WITHERS,
Western Circuit, J. N. WHITNER,
South-western Circuit, J. J. CALDWELL,
Middle Circuit, T. T. PLAYER,
Southern Circuit, J. D. EDWARDS.

*Elected December, 1837, in place of the Hon. HENRY W. DESAUSSEURE, Chancellor and President of the Court of Appeals in Equity; resigned from ill health. Chancellor DESAUSSEURE died on the 29th of March, 1839, at the advanced age of seventy-five years, after a long and distinguished judicial career, having filled the office of Chancellor from the re-organization of the Court of Equity in this State, in 1808, until his resignation in 1837. A more extended notice of this eminent Judge and excellent citizen, will be found in the forthcoming volume of Chancery Reports.

R.

DIED, in Charleston, S. C., on the 19th of November, 1838, in the eighty-fourth year of his age, the Honorable ELIHU HALL BAY, a Judge of the Court of Common Pleas and Sessions of this State, from the year 1790, until his death, a period of nearly half a century. It is not saying too much of this venerable Judge, that no one in this State, has ever filled so high a station with more credit to himself, or more usefulness to the community. Under all circumstances, and in times of the greatest political excitement, when purity of character too often invites rather than repels, the attacks of party violence, no breath of suspicion ever assailed his judicial integrity. While his urbanity, impartiality, intelligence and firmness as a Judge, ensured the unqualified esteem and respect of the profession, his benevolence and kindness as a man, whose whole life was one illustration of all the domestic virtues, endeared him to the community in which he lived. If there was any one characteristic more peculiar than another which distinguished the leaning and temperament of the mind of this venerated Judge, it was a strong and ever present spirit of charity and kindness which extended itself to all with whom he had to do, and as far as consistent with justice, tempered all his judgments with mercy. His veneration for the great principles of the common law created in him a most sincere attachment to that wholesome and noble system of polity; and made him careful in leaving its well defined boundaries and ancient land-marks for new and untried regions, were they ever so seductive or inviting. Not that his love for the good old common law was a blind and unenlightened devotion to its *letter*, but being founded upon a thorough knowledge of its general excellence and adaptation to the interests and well being of a society of freemen, he felt any essential innovation which threatened the destruction of its material parts, or pervading spirit, as one pregnant with danger to our institutions, and as calculated to introduce discord and confusion into the bosom of the State. He was one of the earliest reporters of cases decided in any of the United States, having published two volumes of reports of cases decided in the State of South-Carolina, from the year 1783 to 1804. A *second* edition of the first volume of his reports was published in 1809. The *first* edition having now disappeared, the precise date of it cannot be readily ascertained, but is believed to have been published between 1795 and 1800. They have been the means of contributing largely to the elucidation and settlement of the law in this State, and at the early period at which they appeared, must have been a most welcome and important benefaction to the profession. Although the principles established in some of the cases reported by Judge Bay have, in the course of so long a time been overruled or modified, yet by far the larger portion of the cases are as sound authority to-day as when they were first delivered; and the bar and the bench, from that time to this, have borne continual testimony to the faithfulness and accuracy with which the cases were reported. From his appointment, in 1791, Judge Bay continued to discharge with eminent ability, the duties of his high station, which involved those of a Circuit Judge as well as of a Judge in the Appellate Court. Both as a Circuit Judge, and as a member and presiding officer of the Court of Appeals, he is believed to have given universal satisfaction to the profession and the public. In the year 1817. the legislature,

in consideration of his age, infirmities and faithful public services exempted him from the performance of circuit duty, and from sitting in the Court of Appeals. The preamble of the act is as follows: "Whereas the Honorable Elihu Hall Bay, one of the associate Judges of the Courts of Sessions and Common Pleas, has devoted a long life to the unremitted, upright and faithful discharge of the important duties of his station: and whereas his age and infirmities require an exemption from the more arduous and active duties of a Judge of said Courts; and it is the duty, as well as the interest of the State, to foster, protect and honor those who have worn out the *prime of life* in the public service. Be it therefore enacted," &c. He was henceforth especially entrusted with the discharge of those duties of a Judge which find their employment in the transaction of what is known to the profession as *chamber business*; and in this department of high trust and usefulness, he continued to devote the remainder of his days and strength, to the public service.

In the long series of years in which this virtuous magistrate administered both the civil and criminal laws of the State, who shall estimate the past, present and *future* influence of his services? It is not alone that *through him* crime has been punished, property restored to the rightful owner, character vindicated, and the various injuries which result from the wickedness or the weakness of men redressed, but that through these wholesome administrations of the law, men have been taught to avoid wrong, to cultivate virtue, to ameliorate the heart and amend the life.

We can scarcely over estimate the importance of such lessons of morality and virtue to a society growing up and becoming fashioned under their salutary influences. It was a deep sense of the value of such services to the community, rendered in the full vigor of intellect, and while his physical energies were unimpaired, that in his latter days, and when oppressed with the infirmities of age threw around this excellent man, in the respect and veneration of the people, an impenetrable shield, and covered as it were with a mantle the natural weaknesses of three score years and ten. If it is given but to few to attain the great age of this estimable citizen, to how much fewer can be assigned the rare praise of having devoted a long life to the highest services in the State and the discharge of every social and christian duty, and leaving behind a memory unspotted by a single stain.

DIED, at Charleston, S. C., on the 26th of January, 1839, at the advanced age of near seventy years, the Honorable **CHARLES JONES COLCOCK**, for many years a distinguished Judge of the Court of Common Pleas and Sessions, and of the Court of Appeals, in this State. The following just tribute to the memory of this eminent Judge and estimable citizen is extracted substantially from the Charleston Courier of the 28th of January last.. Judge Colcock was an eminently useful citizen and bore an active and prominent part in public affairs from early manhood to the close of his life. He was distinguished in the legislature of the State, and was elected about the year 1812, an Associate Justice of the Court of General Sessions and Common Pleas, and afterwards received a distinguished mark of the public confidence in being elevated to a seat on the bench of the Court of Appeals, upon the reorganization of the judiciary in 1824, when that tribunal consisted of but three members exercising supreme judicial control over the property, liberty and lives of their fellow citizens. About the year 1830, impaired health requiring that he should seek a less sedentary occupation, he resigned his seat on the supreme bench of the State and received from the legislature another token of public favor in his election to the Presidency of the Bank of the State, which office he held to the time of his death. After his election to the Presidency of the Bank, he became a permanent resident of the city of Charleston, and exerted an active influence in all the leading measures and great enterprises which have signalised the recent history of that city. Until within two years of his death, he filled with dignity and ability the honorary office of President of the Trustees of the Medical College of the State of South-Carolina, and the numerous graduates of that flourishing institution, and the citizens generally will long remember the parental character and high moral tone of his impressive commencement addresses. As a Judge he was distinguished for learning, ability and great steadiness of judgment, preferring an adherence to settled principles, to a resort to innovation and experiment, and the dangerous path-way of bench legislation. His judicial opinions to be found in our books of reports from the year 1812 to 1830, bear ample testimony to the clearness and vigor of his intellect, the soundness of his judgment, and his extensive acquaintance with the science and administration of the law. As a man and public officer, his integrity was spotless, and he added genuine religion and fervent piety to the other virtues of his private character. The community which knew his value, will long feel his loss, and do honor to his memory.

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ERRATA.

At p. 1, in giving the names of the Judges present at Columbia December Term, 1838, the name of EARLE, J., by mistake, was made to precede that of Judge EVANS. In the order of seniority the name of EVANS, J., should precede that of EARLE, J.

At p. 25, 17th line from the top, for "*review*," read "*reverse*."

At p. 76, 12th line from the top, for the words, "*which he had given credit*," read "*which he had not given credit*."

At p. 300, in the last line of the page, insert after the word "*interpretation*," the words "*is included*."

At p. 184, 3d line from the top, for "*he plaintiff*," read "*the plaintiff*;" 4th line of same page, for "*the died*," read "*he died*."

CASES AT LAW,
ARGUED AND DETERMINED IN
THE COURT OF APPEALS.
OF
SOUTH-CAROLINA,
AT
COLUMBIA, DECEMBER, 1838.

JUDGES PRESENT:

Hon. RICHARD GANTT,
Hon. JOHN S. RICHARDSON,
Hon. JOHN B. O'NEALL,
Hon. BAYLIS J. EARLE,
Hon. JOSIAH J. EVANS,
Hon. A. P. BUTLER.

THE STATE v. FRANKLIN H. RAY.

AN indictment for murder had been found by the grand jury, on the 22d of October, 1838. On the 24th, the prisoner was arraigned, pleaded not guilty, and put himself for trial on the country. A jury was impanelled and charged (the prisoner exercising his right of challenge). The solicitor had called his first witness, who was not sworn, when one of the jury called the attention of the solicitor to the fact, that the felony charged in the indictment was laid to have been committed on the 23d of October, 1838, the day succeeding the finding of the bill, instead of the 23d of the preceding month. The error being brought to the view of the Court, the presiding judge ordered the record to be withdrawn from the jury, and that they be dismissed. HELD, that, inasmuch as no judgment could be rendered against the prisoner upon the indictment in this case, he had been put in no jeopardy of life, and was not therefore entitled to be discharged, but still liable to be tried on another valid indictment for the same offence.

There can be no legal trial in a capital case, without a sufficient and valid indictment. An indictment alleging the offence to have been committed in another district than the one in which the bill was found, would be

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insufficient and invalid ; and equally so, if it assigned an *impossible* date to the commission of an offence, as a day *posterior* to the finding of the indictment.

An acquittal upon an invalid and insufficient indictment, is no bar to a second indictment for the same offence.

Where an indictment in a capital case is so utterly defective that no judgment can be pronounced upon it, either of conviction or acquittal, the judge on circuit, in the exercise of his discretion, may properly withdraw the record from the jury, and discharge them from the further consideration of the case, without the consent of the prisoner, and remand him for trial at a succeeding court.

The cases in which and the principles upon which the circuit judge should exercise his discretion as to discharging a jury in a capital or other criminal case stated.

Before BUTLER, J., at Kershaw, Fall Term, 1838.

ON Monday, the twenty-second of October, the first day of the said term, the grand jury returned a true bill against Franklin H. Ray, for the murder of Henry W. Purse. On Wednesday, the 24th of October, the prisoner was arraigned, pleaded not guilty, and put himself for trial on God and his country. A jury was impanelled, the prisoner exercising his right of challenge. The jury were charged—lists of witnesses were handed to the sheriff to be kept separate, and the solicitor had called his first witness, who was not sworn. One of the impanelled jury then called the attention of the solicitor to the fact, that the felony charged in the indictment was laid to have been committed on the twenty-third day of October, 1838, the day succeeding the finding of the bill, instead of the preceding month. The court was thereupon advised of the error, and suspended further proceedings until the next morning, Thursday, 25th October ; and upon this day, to wit, Thursday, the 25th of October, the jury were called to their places, the prisoner placed at the bar, and the court heard argument from the solicitor and the counsel for the prisoner. No motion being made, and the court being left to exercise its discretion as to further proceedings in the aforesaid case, looking to the rights of the prisoner on the one hand and public justice on the other, plainly seeing that no judgment could be rendered against the prisoner upon the indictment aforesaid—satisfied that the prisoner

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is in no jeopardy of life on a trial upon an instrument void, or so utterly defective, and before any evidence had been offered—orders that the record be withdrawn from the jury, and that they be dismissed. • Whereupon, the prisoner moved for his discharge. Ordered, that the motion be refused, and that the prisoner be remanded to answer for his offence at the next term of this court.

The defendant appeals from the order of the judge, and renews his motion for discharge, on the following grounds :

1. Because, the prisoner having been put on his trial for a capital offence, and the jury charged, he was entitled to his trial or discharge.

2. Because, the trial having been arrested and the jury dismissed, the prisoner should have been discharged.

3. Because, the prisoner was entitled to his discharge by the law of the land.

CURIA, per BUTLER, J. This case presents rather a novel than a difficult question ; which, however, from the importance of its consequences, demands serious consideration. It is one which, I think, can be satisfactorily decided on authority. At least, I am relieved from apprehension, from that consideration. With this belief, I shall proceed to consider, and sustain my judgment by authority, on the following positions : 1. Was the prisoner ever charged and put on his trial, on a sufficient and valid indictment ? 2. If not, was his life in jeopardy at any time ? 3. Would an acquittal on such an indictment have been effectual to protect him from a conviction on another and valid indictment ? 4. When it was apparent from the proceedings themselves, that neither a conviction nor an acquittal would have availed him any thing, had not the judge the right to arrest the proceedings and detain the prisoner for a regular and legal trial ? The recital of the indictment would present the statement of facts upon which the circuit judge decided, to wit : that “ We, the grand jurors, sitting as the inquest of Kershaw District, on Monday, the 22d day of October, 1838, do present, that Franklin H. Ray, on the 24th day of the same month, did murder,” &c. I say that this

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would appear, because the recital in the caption can always be made to conform to the truth. The names of the grand jury can be inserted, and the day of the term in which they are in session, and upon which they find their bill. This can be done at any time, without altering or in any wise interfering with the material and essential allegations in the indictment. Before the paper containing the criminal charge is handed out to the grand jury, it is called "a bill of indictment." After it is found, and all the blanks filled up, it is called "an indictment."—2 Hawk. ch. 25, sec. 1. When it is thus made perfect, it must be decided to be valid or invalid, according to the requirements of the law. A legal trial depends on the sufficiency of the indictment, as there can be no trial without an indictment. A trial without an indictment would be illegal and void. The question, then, in this case is, was the prisoner ever put on a legal trial? and that must depend on the sufficiency of the indictment, *as found by the grand jury*. The grand jury have undertaken to say that the prisoner was guilty of a crime, two days in advance of the day on which they found their bill. They have, as it were, looked into the future by divination or conjecture, and have said that an individual was guilty of a crime before the day arrived on which it was committed. It may safely be said that no human tribunal has cognizance of the future: that alone belongs to Deity. I take it, that if a grand jury were to proceed on obvious probability, they could not present an offence an hour in advance of that on which they were sitting—much less a day, or a week, or a month. Their jurisdiction extends only to the past. An indictment ought, and can alone be found in the same district where the offence was committed. And by the stat. 10 Henry VI. 12, if a place be alleged, and there is no such place, the indictment is void—4 Com. Dig. 671. If a grand jury sitting in one district were to find that an offence had been committed in another, their finding would be bad, upon the ground that they had gone beyond their jurisdiction. This position is clear. By alleging the offence to have been committed at any particular place within their jurisdiction, I suppose the indictment would have been good. The same principle may be applied to the time when the offence is alleged. If the time laid

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in the indictment is antecedent to the finding, in general it is not material that the offence should be proved to have been committed either before or after the time laid—provided it was a reasonable time before the finding of the grand jury. Jurisdiction may, however, be as well limited by time as place. Suppose this extravagant case:—that an offence was alleged to have been committed one thousand years back; could the tribunals of the United States, whose territory was not then discovered, take cognizance of it? Narrow the time to a nearer period, but one before which the people of the United States had any existence. Let it approach still nearer our own existence as a state, but before it was settled. In such cases, the offence would appear to be impossible, from the time laid, so far as any legal tribunal could take notice of it. State the time one day forward, and it would be equally impossible, that any human power could say that an offence could be committed. Time, then, sometimes, as well as place, may show a want of jurisdiction and legal competency to take notice of an alleged offence. The concession, both of the solicitor and of the counsel for the prisoner, may be adopted by the court—that the indictment on which the prisoner was arraigned, was defective and insufficient to sustain a legal trial. 2. The prisoner's life cannot be put twice in jeopardy; and the question arises, was his life legally put in jeopardy by his arraignment on an insufficient indictment? I adopt the proposition of Mr. Justice O'Neill, in his well-sustained opinion in the case of the State v. McKee: * “Jeopardy of life is when one is put upon his trial upon a valid indictment for a capital offence; it may result in his condemnation, hence he is in jeopardy.” † The prisoner, Ray, never was on his trial, unless there was a good indictment, and therefore no judgment could have been pronounced on a verdict of conviction. From the time his trial commenced, it was a mere form that could not have resulted in his condemnation. This point need not be elaborated, as it was conceded in argument that the prisoner was in no jeopardy. The 3d proposition was thought to be more doubtful, and it was said that although he was in no danger from

* 1 Bail. Rep., 651.

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a verdict of conviction, that he might have been benefitted by an acquittal; and that he should not have been deprived of the advantage of his position. I am entirely satisfied, from unquestionable authority, that an acquittal would have availed him nothing, so as to be pleaded in bar, to another trial on a good indictment. I have thoroughly examined the authorities on this point, and the general proposition may be thus stated:—When one has been tried and acquitted on a bad indictment, he may be tried again. In the 2d vol. of Coke's Rep. part iv. p. 44, the case of Vaux is reported. The prisoner was indicted in the King's Bench, of voluntarily poisoning one Nicholas Ridley. The defence was, "that the prisoner had been tried and acquitted of the same offence; the proceedings and former indictment are set out. It was resolved by the court that the first indictment on which he was arraigned and tried was insufficient, and principally because it was not alleged expressly in the indictment that the said Ridley received and drank the said poison;" but that the words which implied merely a receipt of the poison were not sufficient to maintain the indictment. It was further resolved by the justices, that the reason of *auterfoits acquit* was, because, where the maxim of common law is, that the life of a man shall not be twice put in jeopardy for the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offence is a good plea, yet it is intendable of a lawful acquittal or conviction; for, if the acquittal or conviction is not lawful, his life was never in jeopardy; because the indictment in this case was insufficient, and for this reason he was not *legitimo modo acquietatus*.* Since this case, its principle has never been questioned in the English courts: on the contrary, it has been recognized and acted on in a number of subsequent cases as unquestionable. Indeed, in all the subsequent cases that I have looked at, it is assumed as a certain

* In the case of the State v. Holley, 1 Brev. Rep., 35, the judgment was arrested for a defect in the indictment; the defendant's counsel thereupon moved for his discharge. The court refused the motion, and say "that he ought not to be discharged, but ought to be indicted again; the indictment being insufficient, his life was never in jeopardy," and refer to Vaux's case, 4 Rep., 45.

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point on which they were to rest.—See the following cases: *Vandercomb and Abbot*, Ea. Cro. Law, tit. Burglary; *The King v. Emden*, 9 Ea. 439; 3 Pr. Wm., 439 to 499.—The 4th proposition may be sustained without calling into question any extraordinary exercise of discretion on the part of the circuit judge. It seems to me that it was matter of indifference to the prisoner, whether the proceedings were arrested or not. If the indictment was void, all the proceedings founded on it were a nullity, and cannot be sanctioned by the mere forms and ceremonies of an arraignment. The case might be considered properly as standing on a motion to quash a void indictment, or to withdraw from the jury a paper that was not in fact an indictment. If the indictment was good, the judge was wrong, and the prisoner was entitled to his discharge, because he was once in jeopardy. The exercise of the discretion of a judge in such a case, never could operate to the prejudice of the prisoner. Consider the case, however, as it actually was—and perhaps it should be so considered—that the prisoner was arraigned on a void indictment, whose defects appear palpably on its face, showing that the prisoner was charged with an impossible offence, did the circuit judge exercise an unauthorised jurisdiction in discharging the jury from the further consideration of the case? In general, when a jury is charged with a case, it cannot be discharged without rendering a verdict. This general proposition is subject, however, to many exceptions, and juries may, in many cases, be discharged without giving a verdict. Mr. Justice O'Neill has pointed out many cases in his opinion above referred to. In all the cases on this point, the judges have given their opinions on the assumption that the jury had been regularly charged on a legal indictment. In none that I have examined, has the question arisen on an invalid indictment. Discretion becomes dangerous in proportion as it may become despotic and mischievous; and when no valid judgment can be rendered, I cannot see the danger of a judge exercising a discretion to prevent one being rendered at all. It amounts to nothing more than quashing the indictment, and ordering the prisoner to stand a legal trial, and places him in no worse or better situation than if he had been convicted or acquitted. It was in the power

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of the prisoner to have obviated any of the consequences of such order, if he apprehended it would operate prejudicially. He could have consented that the record should have been amended. To say that it would be in the power of a prosecuting officer, either to oppress or aid a prisoner, by an irregularity in the indictment, would be but to say that a dishonest and designing officer, similarly situated, could always effect his purpose in other and more effectual modes. From the time that the defect was discovered in the indictment, was it not worse than a mockery to carry on the trial? To put it on no higher ground, it would have been an act of supererogation on the part of the court. It could have availed nothing but to let the parties witness the development of the testimony. It would have been to use the court for a purpose for which it was not constituted. I never would allow the judge to look beyond the record for any cause to arrest the trial; nor in general should he do so, but in palpable and flagrant cases of defect in the indictment. Not that the prisoner would suffer by it; for any mistake of the judge would always operate in his favour. There are many admitted occasions on which a judge must exercise his judgment to discharge a jury. If he were disposed to be corrupt, he could exercise this discretion without the power of control or correction. He must always judge of the necessity—such as his own, or the illness of others concerned in the trial. The remarks against a judge's power to discharge a jury after the arraignment of a prisoner, have been levelled at its abuse, and not its existence. Mr. Justice Foster, in the introductory remarks of his judgment in the case of Sir John Wedderbourn, says, as to the power of a judge to discharge juries in capital cases: "The question is a point of great difficulty and mighty import, and I take it to be one of those questions that are not capable of being determined by any general rule, that hath hitherto been laid down, or possibly ever may," &c. "For I think it impossible to fix on any single rule which can be made to govern the infinite variety of cases that may come under this question, without manifest absurdity." Chief Justice Tilghman makes a similar remark in the case of the Commonwealth v. Cook and others,⁶ Serg. & Rawle, 577, and concludes by saying

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that "Judges have therefore thought it safest to decide from time to time the cases that have been brought before them, taking care not to commit themselves on general principles." So far from laying down a general rule, I have avoided it; and wish to be understood as restricting myself to the particular case under consideration. I am satisfied, under the very peculiar and extraordinary state of the facts of this case, and the glaring defect of the indictment on its face, that the jury ought to have been discharged. I would have the indictment to present the whole case; but here it contains a charge of an impossible offence, or one that the court could not take notice of. It involves no higher power than that the judge should judge of his jurisdiction. Let it not be understood that I would allow a judge to resort to any but a conceded state of facts, for his determination, appearing on the paper itself.

It is the judgment of the court that the motion be dismissed.

RICHARDSON, EVANS and EARLE, Justices, concurred.

O'NEALL, Justice, was not present at the argument, but concurred in the judgment, as pronounced in the above opinion.

Smart, for the motion.

Withers, Sol., contra.

NOTE.—In the case of the State v. Dandy, 1 Brev. R., 395, the prisoner was indicted for a misdemeanor in compounding a felony. The felony stated in the indictment, was for passing a counterfeit bank-bill, which was charged to have been committed *on the fifth day of November, 1802*. The indictment then stated, that "afterwards, to wit, on the *first day of June, 1800*," the said felony was compounded. The prisoner was found guilty, but afterwards moved in arrest of judgment. *By the Court*: The indictment is absurd. It is *impossible* that the defendant can be guilty of the offence as charged. Judgment arrested. R.

King v. Smith.

JOHN KING v. WILLIAM SMITH.

Under the statutes of limitations, of 1712 and 1824, P. L. 101, a. a. 1824, p. 24, the settled construction is, that the right or title to lands, and the consequent remedy by action for an injury to the same, by withholding the possession, can only be barred by an actual *pedis possessio*, for the time fixed by the acts. The reason of this seems to be, that until there is an actual permanent possession by some claimant, the party to whom the *right* or *title* to the land accrued, cannot prosecute it.

The principle that an actual possession of a part of a tract of land, by *color of title*, for more than five years, under the act of 1712, would bar the right of a claimant to prosecute the same, has been irrevocably settled since the case of Reid v. Eifert, reported in a note to 1 N. & M'Cord's Rep., 374; the subsequent cases on this subject reviewed. These cases clearly show that the operation of the act of limitations depends upon an actual possession of the land in dispute, and not upon a mere *non claim* by the plaintiff.

They also show that the plaintiff's right of action for the *locus in quo*, must have existed against *some one* for more than the time allowed by the law, or he cannot be barred. If, therefore, any one, before the defendant, had an actual possession for more than *five* or *ten* years (as the case may be), it would bar the plaintiff as well as if it had been in the defendant.

But, *unconnected* possessions, *each* being for a shorter time than that limited by the statutes, but when joined together making *five* or *ten* years, cannot be united so as to bar the plaintiff.

In actions of trespass to try title to lands, the bar of the statute of limitations can only be interposed to prevent the plaintiff from recovering where he has had a right of action against the defendant, or *some one*, for the *locus in quo*, for *five* or *ten* years, as the case may be, and has during that time failed to prosecute it.

A defendant, who has been in possession of lands for a less time than the statutory period, cannot *unite* his possession with that of a previous tenant, from whom he purchased, in order to make out the five or ten years required by the statute, to bar the plaintiff's right of recovery; for, until that period has run out, they are both to be regarded, as it respects the true owner, as mere trespassers. A conveyance from the first to the second tenant, under such circumstances, conveys nothing.

If both possessions could be referred to one entry, as in the case of landlord and tenant, or in the case of a descent from a *disseisor* to his heirs, and a continuance of possession by them, then the operation of the statute would commence, it seems, from the entry by the landlord or ancestor.

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Before O'NEALL, J., at Orangeburg, Spring Term, 1838.

THIS was an action of trespass to try title. The plaintiff showed a complete paper title to the land. The defendant claimed under a junior grant, to one Kent, in 1804: he died intestate, and the land descended to his widow and child: by them it was conveyed to Meacham, in 1816: he died intestate—the land was conveyed by his heirs, 14th September, 1827, to the defendant. The defendant proved that Meacham cultivated a part of the land, within the lines of the plaintiff's grant, in 1823. This possession was continued by himself and his heirs until 1827, when they conveyed to the defendant. Here the proof in the case stopped. In a previous case, the judge had said to the jury, that incomplete possessions could not be joined together to make out a statutory title. The defendant's counsel, in endeavoring to show an adverse possession of five years before 1824, in Meacham, neglected to give evidence of the possession, on the part of Smith, subsequent to 1827. The plaintiff's attorney consented that the judge should state that Smith had possession from 1827. The plaintiff's writ was sued out in 1835. The case went to the jury, who found, for the plaintiff. The defendant appeals, and moves the Court of Appeals for a new trial, on the ground that "he and Stephen Meacham, from whom he purchased, had possession of the land more than ten years."

CURIA, per O'NEALL, J. By the act of 1712, sec. 2, P. L. 101, it is enacted, "If any person or persons, to whom any right or title to lands, tenements, or hereditaments, within this province, shall hereafter descend or come, *do not prosecute the same within five years after such right or title accrued*, that then, he or they, and all claiming under him or them, shall be forever barred to recover the same, excepting," &c. The 7th section of the act of 1824, Acts, p. 24, extends the time for the prosecution of such right or title to ten years.

The settled construction of the acts of 1712 and 1824, is, that the right or title to lands, and the consequent remedy by action for

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an injury to the same, by withholding the possession, can only be barred by an actual *pedis possessio*, for the time fixed by one of these acts. The reason of this seems to be, that until there is an actual permanent possession by some claimant, the party to whom 'right or title' to the land 'accrued,' cannot prosecute it. In the case of Reid v. Eifert, reported in a note 1 N. & M'C., 374, Judge Smith, who was one of the oldest as well as the ablest of the land lawyers of South-Carolina, delivered the opinion of the Constitutional Court, settling *irreversibly* the principle, that an actual possession of a part of a tract of land, by *color of title*, for more than five years, under the act of 1712, would bar the right of a claimant to prosecute the same. In that case, that learned judge reviewed all the previous cases, and showed that all of them, with one or two exceptions, had taken the view which he then took of this provision of the statute of limitations. In his opinion, he referred to the preamble and first clause, to show that the intention of the legislature was to quiet the estates of the inhabitants of this state, by making an actual possession under an imperfect title, a perfectly good and legal one. This key unlocks the whole statute ; and, keeping it always in our hand, we shall be able to pass, without difficulty, through every part. That decision has been ever since followed. Its principles were fully developed and enforced, by Judge Cheves, in the case of Williams v. McGee, 1 Con. Rep., 85. The intent of the statute being to quiet estates, by making a possession under an imperfect title equivalent to a legal one, it was hence very properly held in the cases of Baily v. Irby, 2 N. & M'C., 343, and White ads. Reid, 2 N. & M'C., 534, that a repetition of trespasses, by cutting down and using timber for the whole time fixed by the statute, would not bar a right or title to lands. The acts done were fugitive, and did not amount to any certain claim of estate, and hence, were neither within the words or intent of the legislature. In the case of Sims v. De Graffenreid, 4 M'C., 253, it was said that, "from the earliest times in this state, where one has good title to land, he might convey it to a stranger, or commence an action against any one in possession, without entry by himself or any previous possession, or even having received rent." This princi-

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ple would negative any conclusion to be drawn from the words of the 2d section, such as, that a mere non-claim for five years after a right or title to lands shall descend, or come, would be a bar. Following up this principle, and that until there was an actual *pedis possessio*, on the land claimed by the plaintiff, the statute would not commence to run, it was held in the case of *Turnipseed v. Busby*, 1 M'C., 279, that where two grants run into one another, a possession by the defendant within the limits of his grant, but outside of the plaintiff's, could not bar the plaintiff. In that case, my brother Gantt, whose experience as a lawyer and a judge is almost coeval with the administration of justice, on this subject, in the upper part of this state, said: "As regards possession, the occupancy of a part of the land by Stephen Smith, and not included in his grant, and not constituting any part of the land claimed by the plaintiff, is not such a possession as will divest the right of the legal owner. The owner of land is only injured when a trespass is actually committed thereon. Stephen Smith's possession, therefore, of a part of his own land, would never, by any just construction of the statute of limitations, give him a title to another's land, over which he had never exercised any act of ownership." In *Sims v. Meacham*, 2 Bail., 101, it was ruled that, where there are interfering claims to lands, without any actual possession of the disputed parcel, that the possession is in him who has the right. This principle received a fuller and better exposition in the case of *Huger v. Cox*, 1 Hill, 135, in which it was held that, where there are actual possessions on two conflicting grants or titles, the elder and better legal title should prevail for all which was not in the actual possession of the defendant for the time fixed by the act. These cases very clearly show, that the operation of the act of limitations depends upon an actual possession of the land in dispute, and not upon a mere non-claim by the plaintiff. The last case, *Huger v. Cox*, proceeds upon the just principle, that a plaintiff in possession of a part of a tract of land, can only be regarded as disseised of so much as the defendant has in actual possession. To this alone is he required by the act to assert his right or title within five years before 1824, and ten years since. All these cases very clearly show, that the plain-

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tiff's right of action, for the *locus in quo*, must have existed against *some one*, for more than the time allowed by the law, or he cannot be barred. If, therefore, any one, before the defendant, had an actual possession for more than five or ten years, it would bar the plaintiff as well as if it had been in the defendant. *Fayssoux v. Prather*, 1 N. & M'Cord, 307; *Wagner v. Aiton*, Columbia, December, 1838. The title of such third person is quieted by the possession, and is equivalent to a conveyance of the estate arising from the elder title. The possession of one by tenants is regarded as his possession, and would have the effect to bar the plaintiff; for, in that case, although the possession is, in fact, in several (the tenants), yet, in law, it is in one (the landlord).—*Duncan v. Beard*, 2 N. & M'Cord, 409. But in that same case, it was very properly ruled, that unconnected possessions, each being for a shorter time than that limited by the statute, but when joined together making five years, could not be united, so as to bar the plaintiff. The subject is not, however, examined in that case, or in any of the subsequent ones, to which I have been able to refer. In *Cantey v. Platt*, 2 M'Cord, 260, it is said, by Judge Huger, "To enable a plaintiff to succeed in his statutory claim to land, he must prove that he has had possession of the land the full time required by the statute law." This principle is, I think, correctly stated, and applies to a defendant's possession as well as that of a plaintiff. In both, possession must operate to quiet the title, or it is of no avail. It has too, in some degree, the countenance of *Turnipseed v. Busby*, 1 M'Cord, 279: for there it was held, that possessions under the same title, could not be joined together to defeat the plaintiff.

So much for cases: they have been reviewed to show that the bar of the statute is only interposed to prevent the plaintiff from recovering where he has had a right of action against the defendant, or some one, *for the locus in quo*, for five or ten years, as the case may be, and has, during that time, failed to prosecute it.—This being, as I think, a clear and well settled principle, if we take it as our guide here, the plaintiff is entitled to recover. The possession of Meacham and his heirs terminated in 1827; as against them, at that time, the plaintiff could have recovered; for

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he still had six years in which he might bring his suit. They had then no title or estate to be quieted—for their possession, so far, was a mere trespass. When they conveyed to defendant, they conveyed nothing to him ; for they had no title whatever to convey. They could not convey the previous trespasses. Their deed was merely color of title to the defendant ; that is, it defined the extent of his claim, when he entered, and followed it up by possession. As against him, the plaintiff could not prosecute his title, until he entered ; and, by the words of the acts of 1712, and 1824, he was entitled to ten years against the defendant, within which to prosecute his action. In *Turpin v. Brannon*, Judge Nott said, “ possession is substituted in place of title.” “ An actual deed, from a person who has no right, conveys nothing.” These two dicta have my entire assent. The first arises out of the intention of the legislature, in enacting the act of 1712. The possession, for the time limited by it, was to make that which was before, no title, a perfectly good one. In the present case, the defendant, when he entered, had no title ; his possession since is not sufficient to stand in place of title. That he received the possession from another, in like circumstances, cannot help him ; for neither, separately, is a title. When put together, they cannot make something out of nothing. If it were so, that both possessions could be referred to one entry, as in the case of landlord and tenant, or in the case of a descent from a disseisor to his heirs, and a continuance of possession by them, then the operation of the statute would commence from the entry by the landlord or ancestor. For then, in legal contemplation, it would be the same possession against which the plaintiff had failed to prosecute his right or title. But in the case of one who purchases from a trespasser, his entry is a fresh disseisin. As to the plaintiff, the defendant stands as a wrong-doer, against whom, as well as the person from whom he bought, he has a cause of action.

The motion is dismissed.

GANTT, EVANS, EARLE, BUTLER, and RICHARDSON, Justices, concurred.

NOTE.—The question involved in this case seems to have been settled

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CLARK & SMITH v. ROBERT PARSONS.

A judgment recovered before a Justice of the Peace in another State, though wanting some of the characteristics of a *judgment*, technically speaking, and *not* considered as a matter of *record*, is to be regarded in the Courts of this State, as *prima facie* evidence of debt, and is placed precisely on the same footing as *foreign* judgments, by the *common law*. Such judgment is, therefore a good foundation for an action here, independently of the original cause upon which it was rendered.

General reputation is not competent evidence of the authority of a Justice of the Peace of another State: a transcript of the act appointing the Justice and conferring on him his authority, would be higher evidence in the power of a plaintiff to produce—and, it seems, the printed laws of another State, published under the authority of the Legislature of the State, would also be competent evidence. [See *Allen v. Watson et al.*, 2 Hill. R., 319.]

Before EARLE, J., at Chesterfield, Spring Term, 1838.

THIS was an action, by way of summary process, on a judgment and execution, obtained before a justice of the peace, in North-Carolina.

It was proved that John Grady, who granted the judgment and issued the execution, was an acting and reputed justice in Anson county, and his signature to the proceedings was proved to be genuine. The defendant had given legal notice of appeal, and had entered into bond to prosecute the same; but the execution having been placed in the hands of the officer, no return of the proceedings was made to the county court, and the appeal had not been

by an early decision in this State, that of *Mazyck v. Wright*, Brev. MS. Rep., (not yet published,) in entire conformity with the principles laid down by the Court. The following note of that case may be found in *Rice's Digest*, 2d vol., p. 320, tit. "Trespass to try Title:" "Any transmission or *mutation* of possession of land, during the time required by the limitation act, to bar the true owner's right of possession, breaks the *continuity of the possession* required by the statute, though the succeeding tenant should derive his possession from the tenant who immediately preceded him, and should claim *through* him by the same *concurrent title*." R.

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heard, and no further steps to prosecute the same by the defendant. The judgment was obtained in January, 1838, on a merchant's account made in Chesterfield.

The presiding judge was of opinion, that such a proceeding before an inferior court, not of record, in another state, could not be the foundation of an action here, and recovered on as such, independent of the original cause of action, and nonsuited the plaintiff, with leave to move the court of appeals to set it aside.

The plaintiffs now moved to set aside the nonsuit, on the ground, that his honor erred in deciding that a judgment by a North-Carolina magistrate is not a sufficient foundation for an action in the courts of this state, and that the party was driven to his original cause of action.

CURIA, per BUTLER, J. The circuit judge who tried this case, nonsuited the plaintiffs, and rests his judgment for doing so, mainly, though, as it would seem, not entirely, on the following ground:—"That a judgment of an inferior court, not of record, in another state, could not be the foundation of an action here, and recovered on as such, independent of the original cause of action." In this position, we do not agree with the judge. Whilst we cannot give such a judgment the dignity and importance of a judgment of a court of general jurisdiction of another state, we are willing to place it on the footing of a foreign judgment. The inquiry then occurs, how are foreign judgments regarded in our courts? English decisions, from which we have taken our's, will give a satisfactory explanation. The doctrine on this subject was not finally settled in England till the decision of the case of *Walker v. Witter*, 1 Doug. 5. In this case, all the authorities are collected and commented on, in the argument of counsel, and the opinions of the judges. The action was debt on a judgment recovered in the Supreme Court of Jamaica, and was admitted to be a foreign judgment of a court of record. The decision was, that an action of debt will lie on such judgment, and that the plaintiff need not show the ground of the judgment. The remarks of Lord Mansfield, are illustrative of the question before us. He said: "The difficulty in the case had arisen from not fixing accurately what a

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court of record is, in the eye of the law. That description is confined, properly, to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England, not of record, have not that privilege, nor the courts in Wales, &c. ; but the doctrine in the case of *Sinclair v. Frazier* was unquestionable. Foreign judgments are a ground of action every where, but they are examinable." It had been contended in the cases quoted, as well as in the case then under consideration, that a plaintiff must resort to the original cause of action, on which the foreign judgment had been recovered, but the court pronounced its judgment against the proposition—holding, that the judgment was the *prima facie* cause of action, and to be good, unless it were successfully impugned by the defendant, throwing the onus of proof on him. The judgment, on which the action under consideration was brought, did not emanate from a court of record in another state, and therefore not embraced within the constitution and laws of the United States, declaring the effect, and prescribing the mode of proof, in one state, of judgments in another. Such judgments are awarded by courts of general jurisdiction, and are conclusive between the parties to them : this is a judgment of a justice of the peace, having only a limited jurisdiction, and is entirely subject to the laws of each state ; or, in the absence of any particular legislative act, to the adjudications of the courts founded on the principles of the common law, and the decisions of other states. The matters and things embraced in this judgment, were so far *res judicata* as to be obligatory on the parties in North-Carolina, as long as it remained unreversed, and was acquiesced in. The justice who gave it, acting under derivative authority from the law, was the authorised agent of the parties to settle their dispute. Parts had been reduced to a whole, having such certainty and enforceable validity as to authorise the sale of the defendant's property under an execution, the original cause of action was merged in the judgment, so far as to deprive it of many of the incidents which had belonged to it ; and, although it cannot be characterized as a *judgment*, properly speaking, with all *its* attributes, it nevertheless gives the plaintiff the advantage in a contest on it, so as to force the defendant to the

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necessity of destroying it, before he can be relieved from its obligations. It requires more proof to establish it, but in other respects, is very much like a justice's judgment in our own state. Although the question involved has never been decided authoritatively in this state, I am authorised, by Chancellor Johnson—the oldest judge in the state, and whose opinion is entitled to respect, for his acknowledged judgment and great experience—to say, that he has always acted on the law as now ruled by the court. Besides, we are not without adjudications, on the same point, in other states; and we should endeavour to make the decisions of the states as uniform as practicable. In the case of *Warren v. Flagg*, 2 Pick., 448, an action of debt was brought on an authenticated proceeding, denominated a judgment, had and recovered in Connecticut, before a justice of the peace having limited jurisdiction only: *nil debet* pleaded, which was demurred to, on the ground that it was such a proceeding as was contemplated by the Constitution of the United States, and the Acts of Congress, made in pursuance thereof. It was held by the Court, in Massachusetts, that the plea was good—and judgment for defendant—which was in effect saying that the paper sued on was no record, or not such an one as to be conclusive between the parties, as it would have been, had it been awarded by a court of record, and certified, according to the act of Congress. But the court explicitly said, that it was a *prima facie* cause of action, to which the act of Congress has no application, but which, as the judge says, “has wisely left the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every state, to be governed by the laws of the state into which they may be introduced, for the purpose of being carried into effect. Being left unprovided for by the constitution or laws of the United States, they stand upon no better footing than foreign judgments; being not more than *prima facie evidence* of debt, and liable to be defeated in their operation, under the plea of *nil debet*, as other foreign judgments are.”

The decision in New-York goes much further, in which it is laid down, 3 Wend., 367, that a judgment recovered before a justice of the peace might be entitled to have full faith and credit

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extended to it in another state, provided it should be proved that the subject matter was within his jurisdiction, and the proceedings conformable, in all respects, to the statute produced. We do not, in our judgment, go so far: we regard such judgments as *prima facie* evidences of debt, to be proved by common law rules of evidence, and subject to be defeated by the defendant, either by proof on his part, or the absence of proof on the part of the plaintiff.

This suggests another view of the case before us, and according to which, the decision below may stand. The presiding judge says, that the only evidence of the North-Carolina justice's authority, was general reputation. This, certainly, was not competent; as it was not the highest evidence which the plaintiff could have produced, nor the safest for the court to act on. To require no higher evidence, might lead to mischievous consequences, which will be obviated by adhering to the rules of evidence. It was in the power of the plaintiff to have procured a transcript of the act appointing the justice, and conferring on him his authority. Our courts have said that the printed laws of another state, published under the authority of the legislature of the state, may be given in evidence. I have a great aversion, however, to go beyond the point, and to prescribe, prospectively, any rules for the decision of cases—and therefore lay down no rule.

Upon the whole, our judgment is, that the circuit decision must be overruled on the first point discussed, and may be sustained on the last. We think it probable, however, that the attention of the judge may not have been sufficiently attracted to this point; and as other evidence may have been procured, or can again be procured, to obviate all objections, the nonsuit is set aside, and a new trial granted.

GANNT, RICHARDSON, EVANS, EARLE and O'NEALL, Justices, concurred.

Robbins and M'Iver for appellants.

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JACQUES BISHOP v. WILLIAM ROSS.

A letter of guaranty was given by the defendant to the plaintiff, by which the defendant consented to be liable for the amount which a third person, whom he recommended as a customer to the plaintiff, might, at the time of the delivery, receive. The party received goods to the amount of \$225 03½. Defendant repeatedly acknowledged his liability to pay this amount, and afterwards promised to pay the same. HELD, that, inasmuch as interest was not recoverable by our law, against the principal debtor upon the open account, in this case, the obligation imposed by the guaranty making defendant liable only to the same extent, interest could not be recovered from him.

Before O'NEALL, J., at Sumter, Fall Term, 1837.

THIS was an action on a letter of guaranty, by which the defendant consented to be liable for the amount which a third person, whom he recommended as a customer to the plaintiff, might, at the time of the delivery, receive. The party then received in merchandise, leather and shoes, to the amount of 225 03½. The defendant repeatedly acknowledged his liability to pay this amount, and, from at least one year after the articles were delivered, promised to pay the same. The only question now made, is the defendant's liability for interest. The presiding judge thought, as the promise to pay was in writing, and the sum was ascertained and fixed, that the plaintiff was entitled to recover interest on the account, from the expiration of one year after the date of the letter of guaranty. The jury found accordingly: the defendant appealed on the annexed grounds:—

Because, it is respectfully submitted, that his Honor misdirected the jury, in charging them that on the cause of action interest should be allowed. Because, the finding of the interest was against the law and evidence.

CURIA, per RICHARDSON, J. The single question is—whether interest can be recovered against Ross, the guarantor, on an open

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account, due by his principal? The law is settled, that no interest can be recovered against the principal debtor, on such open account; and, it is equally plain, that the undertaking of a surety, or guarantor, is to answer for the debt due by the principal, and not for more than the principal owes.

The letter of credit, then, of the defendant Ross, answered no purpose but to make him liable for the amount of the indebtedness of his principal, and could not give character to the debt. The guaranty must be put in writing, in order to render the surety liable at all. But, it does not liquidate the debt, nor, in any way, alter its form, or legal effect. These depend upon the contract of the principal himself, and are not affected by the subsequent acknowledgments of Ross. But, it is also plain, that the principal is responsible to his guarantor, for the amount recovered against him, as guarantor. If, therefore, we allow interest, in the first instance, against Ross, on the plaintiff's open account, Ross must recover the same interest against the principal debtor: and it would follow, that interest is recoverable on the open account, notwithstanding the rule just laid down, that it is not recoverable, I scarcely need add, that such inconsistency must prevent the recovery of the interest in this case; and, a new trial is ordered, unless the plaintiff release the interest.

GANTT, EVANS, EARLE and BUTLER, Justices, concurred.

Moses, for appellant.

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A. W. THOMPSON v. SOLOMON & WILLIAM CROCKER.

Defendants executed, and delivered to the plaintiff, the following paper :

"I promise and agree to execute a good and legal mortgage to A. W. Thompson for any piece of land he may wish that will be sufficient to pay him a debt of one hundred and fifty dollars, which *we* owe him, for defending a case in the Court of Equity, James Tollison against us. Given under our hands and seals, this 12th April, 1828. It shall be as much as one hundred and fifty acres and no more, except we wish it." S. Crocker, one of the defendants, subsequently, did execute a mortgage to the plaintiff, which was accepted by him, HELD, that according to the true construction of the instrument, it was an acknowledgment of a debt due by *both*, with an agreement that *one* of them should give a specific lien, by mortgage, to secure the payment; and, that, notwithstanding the delivery of the mortgage, the debt remained the debt of *both*, and that the action would lie against both. Nonsuit granted below set aside.

Before EVANS, J., at Spartanburg, Fall Term, 1838.

THIS was an action on the following paper : "I promise and agree to execute a good and legal mortgage to A. W. Thompson, for any piece of land he may wish, that will be sufficient to pay him a debt of one hundred and fifty dollars, which *we* owe him for defending a case in the court of equity, James Tollison against us. Given under our hands and seals this 12th April, 1828. It shall be as much as one hundred and fifty acres, and no more, except we wish it." Signed and sealed by defendants.

Solomon Crocker, subsequently, did execute a mortgage to the plaintiff, which was accepted by him. The circuit judge was of opinion, that the agreement above recited was only executory, and was subsequently executed and discharged, by the delivery of the mortgage. Under this view, the plaintiff submitted to a nonsuit, with leave to set it aside.

CURIA, per EVANS, J. Upon a review of this case, I am satisfied I was wrong, in nonsuiting the plaintiff on the circuit. I think, the true construction of the instrument is an acknowledgment of

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a debt due by both, with an agreement that one of them should give a specific lien, by mortgage, to secure the payment. This was done by Solomon Crocker, but the debt still remained the debt of both, and an action would lie against both on this paper. This construction is confirmed by the fact that the instrument was not delivered up when the mortgage was executed. A creditor may take a mortgage from one joint obligor to secure a debt due by both ; and that I take to be, in substance, what was intended in this case. The motion, to set aside the nonsuit, is granted.

GANNT, O'NEALL, EARLE, BUTLER and RICHARDSON, Justices,
concurred.

Henry and Bobo, for plaintiff.

Young and Dean, contra.

J. M'KEE v. THE TOWN-COUNCIL OF ANDERSON.

By the act of incorporation of Anderson, power is given "to the Town-Council to impose fines for the violation of their Ordinances, and, if for less than \$ 20, to try the offender." The plaintiff was alleged to have committed a breach of an ordinance, by exhibiting certain *shows*. For this, he was summoned before the council and fined. He paid the fines, and brought an action, before a magistrate, to recover them back. **HELD**, that if the "Council" had not jurisdiction of the subject, the plaintiff's remedy was by *prohibition* ; and, that after paying the fines imposed, an action to recover the money back would not lie ; and, that if they had jurisdiction of the subject, their judgment was *final*.

The judgment of a court of competent jurisdiction, on a matter within its cognizance, is conclusive.

Before GANNT, J., at Anderson, Fall Term, 1838.

THIS case comes up on an appeal from a magistrate's decision, being a suit instituted for money had and received, for so much

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money, which plaintiff alleged had been improperly collected from him, under the act of the legislature of 1836, imposing a tax on shows. The only question raised was, whether the plaintiff was subject to the tax, the magistrate having so decided, although the defendant had also objected, before the magistrate, to his jurisdiction of this case. The only evidence before the magistrate was the handbill of the plaintiff, which accompanied his report; in compliance with which notice, it was admitted, there had been three several exhibitions on three several days—on which an execution had issued for fifteen dollars, and which was paid, with costs, to the sheriff, by the plaintiff. The presiding judge was of opinion that the plaintiff was not liable to pay the tax, and that the suit was well brought, and therefore reversed the decision, and gave judgment for the sum sued for.

The defendants now moved the Court of Appeals to review the decision of the presiding judge, on the following grounds: 1. Because, the plaintiff was, by his own showing, subject to the tax imposed for “shows of any kind,” this being “a Grand Exhibition of the improved Magic Lantern.” 2. Because, his handbill shows his pretended ‘lectures’ was a mere evasion of the law, accompanied, as they were, with “Magical Views” of various portraits, exhibiting persons and costumes in no way illustrative of his subject. 3. Because, he who exhibits the ourang-outang, monkey, great ant-eater, and such animals, for gain and reward, whether in life, painting, or magical illusion, is a showman, and subject to the tax. 4. Because, to have sustained his action, the character of the lectures and of the lecturer should have been shown, by satisfactory proof, as placing him without the purview of the law. 5. Because, the order of the court, if the magistrate was in error, should have been a new trial. 6. Because, the defendants were not liable, in this form of action, and before a magistrate.

CURIA, per EARLE, J. The act of incorporation gives authority to the Town-Council of Anderson, to impose certain fines for the violation of their ordinances, and, if less than \$ 20, to try the offender. The plaintiff, it was alleged, committed a breach of an ordinance by exhibiting certain shows. For this, he was summon-

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ed before the council, and fined. He paid the fines, being \$ 5 for each exhibition, amounting to the sum of \$ 15, and brought this action to recover it back.

If the council had jurisdiction of the subject, their judgment is final. If they had not, the plaintiff's remedy was by prohibition. If he was not subject to their cognizance, he could have prevented the collection of the money. After having paid it, we do not perceive how he can be allowed to recover it back, without a departure from well settled principles. The judgment of a court of competent jurisdiction, on a matter within its cognizance, is conclusive. If the charter gives an appeal from the decision of the council, the plaintiff should have appealed. If it does not, I cannot perceive how the justice or this court could aid him. He does not come within the cases on the subject of money paid under color of legal proceedings, or void process, or extorted, or obtained by oppression.

If we consider the question of his liability, as we should on an appeal, it is equally clear that he was properly fined, for exhibiting figures and shows, in violation of the ordinance. It is only necessary to read his advertisement:—"Splendid Magical Views of the Ptolemaic System, and other Systems of Astronomy; Splendid Views of all the Kings and Queens of England; Splendid Portraits, showing the Modern Costume of various Nations; Splendid Views of Beasts, Birds and Fishes!" This seems to include every portion of Nature, whether in Heaven, or on Earth, or in the waters of the Sea, and must come up to any definition of figures and shows. The council was not in error, nor was the justice; and his judgment is affirmed.

RICHARDSON, BUTLER and EVANS, Justices, concurred.

Whitner, for the motion.

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PERRY E. DUNCAN v. GEORGE SEABORN and H. COBB, Ex'ors.

The declarations of a deceased party to a note, who, if alive, could be examined as a witness in the case to the same point, are incompetent and inadmissible.

Before GANTT, J., at Greenville, Spring Term, 1838.

THIS was an action of assumpsit, to recover from the defendants, as Executors of Ransom Cobb, the proportion of debt for which the said Ransom Cobb was liable, as security, on a note, paid off by the plaintiff, Duncan, to William Choice, to which note Duncan alleged himself and Ransom Cobb to have been co-securities. In the investigation of this case, it became a primary question to ascertain who was the principal in the above note. The plaintiff alleged that James M'Daniel was principal, and the other signers securities. The ground of defence was, that Duncan, the plaintiff, was himself the principal, and being so, he had only paid off his own debt, and could have no recourse against defendants, to recover against them.

The jury found for defendants. Thomas M'Daniel was the first signer to the note. The presiding judge overruled the offering in evidence the declarations of M'Daniel, that he was the principal.

The plaintiff now moves for a new trial on the following grounds:—1. Because, his honor, the presiding judge, refused to permit the plaintiff to offer in evidence the declarations of James M'Daniel (who is dead), that he, M'Daniel, was the principal in the note to Choice, and that Duncan and others were his securities. 2. Because, his honor decided that the declarations of the principal in a note—although he is dead—could not be given in evidence on a trial between his securities to the note. 3. Because, the verdict of the jury was contrary to law and evidence.

Duncan v. Seaborn & Cobb, Ex'ors.

CURIA, per EARLE, J. The declaration of M'Daniel, one of the makers of the note, and whose signature was the first of them, was offered in evidence on the trial—he being then dead—to prove that he was the principal in the note, and that the other persons who joined in it were his co-sureties. To decide whether it was competent and admissible, it will only be necessary to inquire, within what description of evidence it is to be classed? The argument of counsel for the motion, seemed to place the competency upon the ground, that M'Daniel was not interested in the controversy between his securities, and that his declaration went to charge himself with the whole debt; therefore, if alive, he might have been examined as a witness. This view of the question presents it as one of hearsay evidence, in the broadest meaning. The well-settled rule, as old as the common law courts of justice, excluded such evidence—except in particular cases—for very obvious reasons. Such declarations are without the sanction of an oath, and, without cross-examination, the bare assertion of a particular fact; a narrative of something that has occurred, and not entitled to the respect or credit of a court of justice, as evidence. They do not come within any of the exceptions, which permit hearsay to go to the jury, as pedigree, prescription, custom, or boundary. Nor do they come within another class of cases, where such evidence is introduced, not as proof of a distinct fact, but as being, in itself, part of the transaction in question; such as the declarations of an occupant of land, on taking possession, of the nature of his title or of his tenancy; or, the declarations of a trader, on a question of bankruptcy, as to his motive for leaving home; and many other cases that might be put, of frequent occurrence, to illustrate this familiar exception to the general rule of hearsay evidence. Here, there is a mere naked offer to prove that M'Daniel said he was the principal in the note. His being dead does not vary the case; and, it is a conclusive answer to the proposition, that, if alive, he might have been examined as a witness. What a deceased witness has sworn on a former trial, between the same parties, on the same issue, is frequently admitted. But, I doubt if a case can be found, where such an attempt as this is reported to have been seriously made, unless in Gamons

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v. Barnard, 1 Anst., 298, where evidence of the declarations of a deceased tenant, of an act done by himself, was offered, in a suit concerning tithes, and rejected. Ch. Baron M'Donald, remarking on the cases cited, said, "the present attempt goes to establish that the declarations of a dead man are, in all cases, to be received."

The Circuit Court did not err in rejecting the evidence, and the motion for a new trial is refused.

GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, Justices, concurred.

Perry, for the motion.

WILLIAM CHISWELL, Assignee, v. LEWIS ELLZEY.

THE SAME, v. THOMAS A. COBB.

THE SAME v. GOLLOTHAN WALKER.

Where a defendant has once given bail to the action upon the original writ, and is surrendered by his bail to the sheriff, the sheriff has no authority, after the return of the writ, to let the defendant to bail a *second* time.

By the Statute 23 Hen. VI., c. 9, the condition of a bail-bond must be—"that the defendant shall appear at the day contained in the writ;" and, if conditioned for his appearance at a day *after* the return of the writ, is void.

The Stat. 43 George III., c. 46, § 6, not being of force in this State, it may well be doubted whether, after a surrender by bail, there is any power under our law which can again let the defendant to bail. If there is, it must be upon the defendant's entering into a recognizance of special bail, before some justice of the quorum, or clerk of the court, who, by the act of 1791, 1 Faust., 167, are constituted commissioners of special bail, and obtaining thereupon a judge's order for his discharge. *Ob. dic.*, per O'NEALL, J.

Chiswell, Assignee, v. Ellzey. Same, v. Cobb. Same, v. Walker.

Before O'NEALL, J., at Edgefield, Fall Term, 1838.

THESE actions were brought on a bond, given to Oliver Fowles, Sheriff of Edgefield District, and conditioned for the appearance of one Thomas N. Davis, in the case of William Chiswell against him. It appeared that, to the return term of the writ, Davis gave bail, who, during the pendency of the suit, surrendered him; and thereupon, these defendants, with Davis, executed the bond now in suit, conditioned for his appearance at the term *next succeeding* the date of the bond. There was some evidence that these defendants surrendered Davis to the sheriff's deputy, in Hamburg; but, as the case was decided on another ground, that is now unimportant to notice.

The presiding judge was of opinion that, after the sheriff had once let the defendant to bail, he had no authority after a surrender by the bail, again to permit him to enter bail to the action. That the statute of Henry requires the bond to be conditioned for the appearance of the defendant on the day named in the writ, and if otherwise conditioned, it is declared to be void. This bond was conditioned for the defendant's appearance at a *day subsequent* to that named in the writ, and hence was void, and nonsuited the plaintiff in all the actions. The plaintiff now moves the court to set aside the nonsuits in these cases, on the following grounds: 1. That the sheriff, upon the surrender of the principal by his sureties to the original bond, has the right to let the principal to bail again, and that the plaintiff can legally maintain these suits. 2. That there was no legal and sufficient surrender of the principal by the sureties, or either of them, in these cases. 3. That, according to law, on the facts proved, the plaintiff ought to have recovered.

CURIA, per O'NEALL, J. In these cases, after much examination, and a careful consideration of every argument in favor of the plaintiff, we have been compelled to sustain the circuit decision. In doing so, we are sensible of the hardship which results in these cases; but we have no right to stay the descent of the

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sword of justice, because it may strike unsparingly; or to hold up, by sheer force, the scale, because the law may preponderate over our notions of abstract justice. For us, it is sufficient, that we find the law to be against the plaintiff. On another occasion, its justice may be as transparent as light, and its wisdom so plainly written, that he who runs may read it. The acts of 1785 and 1809, have turned bail to the sheriff into bail to the action, or special bail: *Loker v. Antonio*, 4 M'Cord., 177; *Harwood v. Robertson*, 2 Hill., 336. The first of these acts merely prevents the plaintiff from proceeding against the bail to the sheriff, until judgment and execution against the principal, and a return of *non est inventus*, or *nulla bona*, by the sheriff. The act of 1809, p. 30, provides, in the 3d section, "that in all actions hereafter to be brought, wherein the defendant or defendants shall be held to bail by the sheriff serving the writ or process, the bail so given to the sheriff shall be entitled to all the rights, privileges and powers of special bail, and may surrender his principal in discharge of himself, or the principal surrender himself in discharge of his bail, in the same manner, and to the same extent, as special bail are now entitled to; any law, usage or custom to the contrary, in any wise, notwithstanding." In the 4th section, it is provided, "that it shall not be necessary hereafter for any bail to obtain a judge's order for leave to surrender his principal." The act of 1827, 3d section, p. 81, can have no application to the case before us. It authorises the clerks, justices of the quorum, and the judges, to grant orders for bail, pending the suit. But no such order was made in the case before us. The order for bail was made when the writ issued. The case must therefore be decided without any reference to that act. By the act of 1809, the original bail had the right to surrender, which he exercised; and thereupon he was discharged, and the defendant, Davis, left in custody of the sheriff. Having no peculiar law of our own, the question would be naturally asked, what, in a similar case, would be done in England? By referring to Petersdorff's Abridgment, 2d vol., tit. Bail, 7 sec., p. 99, I find, that, until the statute of 43 Geo. III., c. 46, § 6, it was doubted, whether a prisoner could be let to bail in vacation, by putting in and justifying bail before one of the

Chiswell, Assignee v. Ellzey. Same v. Cobb. Same v. Walker.

judges. Since that statute, it has been decided, that bail may be put in and perfected (before one of the judges), at any time pending the suit, or even after verdict. But, it is clear that, at no time, could the sheriff, after the return of the writ, let the defendant to bail. The statute 43 Geo. III., c. 46, § 6, not being of force here, it may well be doubted whether, after surrender by bail, there is any power which can again let the defendant to bail. If there is, it must be upon the defendant's entering into a recognizance of special bail, before some justice of the quorum, or clerk of the court, who, by the act of 1791, (1 Faust., 167,) are constituted commissioners of special bail, and obtaining thereupon a judge's order for his discharge. These observations are, really, unnecessary to this case; they are made with a hope that they may lead the minds of others to think upon the subject, and thus to bring about some plain remedy for an obvious defect in the administration of justice. This action is not brought on a recognizance of special bail; it is on the common bail-bond to the sheriff, conditioned for the appearance of the defendant on a day after the return of the writ. The condition of the bond is not, therefore, that the defendant shall "appear at the day contained in the said writ," and is declared to be void, by the statute 23 Henry VI., c. 9. In 2 Saund., note 3, 60 a., it is said, "the bond must also be taken by the sheriff, before the return of the writ, otherwise it is void." Pullein v. Benson, 1 Ld. Raym., 352. In Thomson v. Rock, 2 Petersdorff's Abridg., 94, it is said by the court, that "the sheriff had undoubtedly no authority to take a bond for appearance, after the return-day was past." These authorities are so clear against the plaintiff, that it is unnecessary to pursue the subject any further. The motion, to set aside the nonsuit, is dismissed.

EVANS, EARLE, BUTLER and RICHARDSON, Justices, concurred.
GANTT, J., dissented.

Griffin and Burt, for the motion.
Wardlaw and Bausket, contra.

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H. H. STEWART and SILAS COOPER v. C. M. VAUGHAN.

In the case of *co-sureties*, who pay the debt of their principal, the general rule is, that each must sue for the amount paid by him ; and if they were to join, their interest generally being several, they would fail. But, where the debt of the principal has been paid out of a *joint fund*, or by the *joint credit* of the sureties, then, the payment being a joint act and creating a joint interest, they may sustain an action against the principal, in their joint names.

Where *co-sureties* pay the debt of their principal, by their *joint* and *several* note, such payment is equivalent to a payment by a common fund, or money, belonging to both, and gives a joint right of action to *both*, against the principal, to recover over from him the amount so paid.

Before O'NEALL, J., at Abbeville, Fall Term, 1838.

THE plaintiffs were the sureties of the defendant, in a promissory note, to Mr. James S. Wilson. They were requested to pay it (perhaps sued). They gave to Mr. Wilson their joint and several promissory note for the balance due, which he accepted as payment, and gave up to them the original note. They brought jointly this action, by way of summary process, to recover the sum so paid. A motion was made for a nonsuit, on the ground that their cause of action was several and not joint. The presiding judge inclined to take that view; but after hearing Mr. Martin, and considering the authorities to which he referred, (1 C. P. 8, 5 E. 225,) was induced to change his first opinion : the motion for nonsuit was then overruled, and a decree given for the plaintiffs. The defendant appealed from this decision, and now renews his motion for a nonsuit, on the ground that the note of the plaintiffs, with which the note to Wilson was paid, was the several note of the plaintiffs, and the payment was not made with the joint fund of the plaintiffs.

CURIA, per O'NEALL, J. The general rule is, that the Court "will not take cognizance of distinct and separate claims or lia-

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bilities of different persons in one suit, though standing in the same relative situation," 1 C. P. 8. In the case of sureties who pay the debt of their principal, the general rule is that each must sue for the amount paid by him : and if they were to join, their interest generally being several, they would fail. But, to this rule there seems to be this exception, if the debt of the principal has been paid out of a joint fund, or by the joint credit of the sureties, then the payment being a joint act, and joint interest, they may sustain an action in their joint names, 1 C. P. 8-9 ; 5 E. 225.

This exception has not been disputed on the present occasion : but it has been contended that this case does not come within it. The payment on which the plaintiffs proceed, was by their joint and several note. In cases of a joint interest or liability, the interest or liability is in or for the whole thing or sum. This interest or liability being thus inseparable, makes the parties one in court. Here let it be asked, first, what liabilities have the plaintiffs incurred by paying the defendant's debt by their joint and several note ? The payee may treat it, as joint or several as he may choose : he may collect it in equal moieties from each, or he may collect the whole from either. This shows that, to all legal purposes, it was a payment by their joint liability, and of course, by their joint credit. Let it now be asked, what is their legal interest arising out of the payment so made ? The note with which it is made is the note of both, or either, for the whole sum contained in it ; this makes it the common fund of both. I can perceive no difference between it and money belonging to both. When received as payment, it is considered *quasi* money ; and hence, is the payment of both, out of a joint fund. If, on their joint note, the money had been borrowed, and the debt paid with it, the case from 5 E. 225, would have been conceded to be a direct authority for the maintenance of the suit. What is the difference ? The debt has been paid by their joint note, without the circuitry of borrowing the money. But the analogy of the case from 5 E. 225, is perfect to this view of this case. For, in legal effect, Wilson, the payee, may be regarded as loaning to these plaintiffs the money, upon their joint and several note, for which they were the defendant's securities. This view is strengthened by the fact, that the note of

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their principal, when their note was accepted as payment, was delivered to them; thus making it their joint property.—The motion is dismissed.

GANTT, EVANS, RICHARDSON, and BUTLER, Justices, concurred.

Burt and Thompson, for the motion.

Martin, contra.

JAMES SOUTHERLIN, et al., Appellants v. JAMES M'KINNEY, et al.,
Appellees, Executors of A. M'Kinney's Will.

On an appeal to the Court of Common Pleas, from the decision of a Court of Ordinary, establishing a Will, the correct practice is, for the appellants to file a suggestion, setting forth the proceedings in the Ordinary's Court, and then to assign, specifically, the supposed errors in the judgment of that court.

In such a case, the appellants, who are regarded as the actors and affirmants of the truth of the issues before the court, are bound to open the case, and are entitled to the reply in evidence and argument.

Amendments should, in general, be allowed, where they do not operate to delay or prejudice the other party; but even then it is not usual to allow them, except in cases of surprise or accident. Nothing of that kind being pretended in this case, the motion to amend was properly refused.

Before EVANS, J., at Greenville, Fall Term, 1838.

THIS was an appeal from the decision of the ordinary. The executors had been cited before the ordinary, to prove the will of Alexander M'Kinney, in *solemn* form. The ordinary heard the case, and decided in favor of the will. The parties protesting against the will appealed to the court of common pleas, and assigned, for error, in the ordinary's decision, 1. That the testator did not read or hear the will read. 2. That there was no evi-

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dence of instructions. 3. That the will was void. At the moment the trial began, the appellants moved to make other issues: that the testator was insane, and that the will was obtained by undue influence. The presiding judge refused to allow this amendment, unless the other side consented: this was refused. The appellants then contended that the appellees should go on and prove the will. The judge decided that the appellants were the actors, and entitled to open the case, and to the reply, both in evidence and argument. The case was tried; no evidence was given to impugn the will in any way, and the jury decided for the appellees. The appellants now moved for a new trial on the following grounds: 1. Because, his honor ruled that the appellants were bound to go on as the actors in the issue, without the executors proving the will in the first place. 2. Because, the court confined the parties to the specific grounds made in the suggestion. 3. Because, the court refused to permit the protestants to insert the grounds that the will was obtained by undue influence, and that the testator was of unsound mind.

CURIA, per EVANS, J. The points made in the 2d and 3d grounds, it is unnecessary to discuss; they are too well settled to require the expression of any opinion. Amendments should, in general, be allowed, where they do not operate to delay or prejudice the other party; and even then, it is usual to allow them only in cases of surprise or accident. Nothing of this sort was pretended.

I understand, the great object of this appeal is, to settle the question of practice which is presented in the 1st ground.

An appeal from the ordinary is given by the act of 1789, P. L. 489. That act directs that the circuit court shall hear and determine such appeals, according to the custom, usage, and practice, in cases of appeal from the county courts. By the county court act, P. L. 372, appeals are directed to be carried up to the circuit court, by assignment of errors in the judgment of the county court. In pursuance of this provision, I think, the practice has been uniform to file a suggestion, setting forth the proceedings in the ordinary's court, and then to assign specifically

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the supposed errors in the judgment of that court. This course had been pursued in this case, and the question was, who should open and close, in the evidence and argument. The appellee has the decision of the court below in his favor. His rights are fixed. Until that decision is reversed, his position is purely passive. By the 62d rule of court, and the uniform practice in the trial of issues, the party affirming the question must begin, and is entitled to close the case. The appellants, in this case, were the actors; they were the affirmants of the truth of the issues before the court, and would have been equally so, had they been allowed to add to the issues that the testator was *non compos*, or that the will was obtained by undue influence. I have never known any other rule than that which was prescribed on the trial of this case; but I learned then, for the first time, from the bar, and since from my brethren, that there has been a diversity of practice in this particular. The error has arisen from some loose expressions to be found in some of the earlier cases, in which it is said, that on the trial of appeals from the ordinary, on the validity of a will, the trial is *de novo*. It was formerly a question, whether these appeals were not to be decided on the evidence reported by the ordinary; and it is in reference to this question that the expression 'trial *de novo*' is used; that is, the evidence shall again be heard in the circuit court. The question made in this case was decided by the appeal court, in 1828, in the case of *Scott v. Scott*; and, if that case had been reported, or was likely to be reported, I should have contented myself by referring to it. In that case, as in this, the ordinary had decided for the will. The appellants were the heirs at law, contesting the will, in both cases. In that, they claimed to be the actors, with the right to open and close the case, and a new trial was granted, because it had been refused them. In this case, the appellants disclaimed the right, and insisted it belonged to the other party: that case is decisive of this,—and the motion is refused.

GANTT, O'NEALL, EARLE, BUTLER, and RICHARDSON, Justices, concurred.

W. and J. Choice, for appellants.

Madison & Latimer *ads.* M'Cullough.

MADISON & LATIMER *ads.* JOSEPH M'CULLOUGH.

In an action on a note for the purchase money of a negro slave, the vendor's title to which was warranted on the sale, the defendants set up, by way of *discount*, certain defects in the title, and claimed an abatement of the price. The supposed defects depended upon many contingencies; no *loss* to the defendants had occurred, and it was uncertain whether any injury to them on that account, *would ever* result. The defendants, with a full knowledge of the defects in the title, after the *first* note given for the purchase money fell due, made an arrangement with the plaintiff, giving him a new note by way of renewal, payable in a year after with interest, (which was the note now sued on,) during all which negotiation no objection was made on the score of deficiency in the title. The jury found a verdict for the plaintiff, without allowing any abatement, and a motion for a new trial was dismissed.

In the sale of personal property, e. g. a negro slave, where there is a warranty of title, the warranty stands as an indemnity against *loss* from any defect in the title of the vendor; and without *loss*, there can be no claim for abatement in the price of the thing sold by way of *discount*, in an action for the purchase money.

A *discount* must be something capable of valuation; something which can be estimated in *money*.

Before EVANS, J., at Laurens, Fall Term, 1838.

THIS was an action of assumpsit on a note for \$963. The defendants were negro traders, and purchased a negro woman, named Charlotte, from the plaintiff, at the price of \$900. It appeared, Charlotte had been bequeathed by one James Ritchie to his daughter, Mrs. Wyatt, for life, with remainder to his children. Wyatt, the husband, sold her to M'Cullough, and he to defendants, giving them warranty of title and soundness. The defence was, the deficiency of title; which, the witnesses said, was understood by both parties. She was carried to Alabama and sold; but the purchaser learning the defect of the title, refused to pay, and the defendants were compelled to take her back. After this, Latimer, one of the partners, returned to this state, leaving Madison with the negro in Alabama. The note was then due, and when called on for the money, he said if he had met

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M'Cullough a day or two sooner, he would have paid. He made no objection to this defect in the title, although it was then well known. By agreement between the parties, the old note was given up, and this note was given as a renewal, payable a year after, with the interest added ; and one witness said this note was given in consideration of M'Cullough's waiting a year. During all this negotiation, no objection was made by Latimer that there was any deficiency in the title. Charlotte had no children, and there was no proof whether Mrs. Wyatt had children or not. One Dairs, a witness, said, he told Latimer that Charlotte was entailed property, and he said it made no difference—he intended to take her to Alabama. After this note was given, Charlotte was again sold, in Alabama, on a credit ; but the purchaser had refused to pay, and a suit was now pending for the purchase money, the purchaser there contending for an abatement of the price, on account of the defect of title. His honor did not feel himself at liberty to charge the jury, that this defence, under the facts of this case, could not avail the defendants ; but was much inclined to think that a warranty of title, of a chattel, should be construed like a similar warranty of land, and that whilst the purchaser retains possession, and has never been molested, he can only recover nominal damages. The jury were directed to allow the defendants a discount, for the value of the remainder limited by Ritchie's will to Mrs. Wyatt's children, unless they believed from the evidence, when this note was given with an extended credit, it was understood between the parties the defect in the title was waived. The judge felt himself much embarrassed to lay down any rule, by which the abatement in the price was to be estimated. Charlotte was about twenty-seven years old, and had no children. She was older than Mrs. Wyatt, and might die first, so that the remainder would be worth nothing. The contingencies were so many and so uncertain, that the presiding judge inclined to the opinion that the jury were right in making the defendants pay the whole sum. He remarks, that “ all the difficulty arose out of the acts of the defendants ; when they were clearly informed of the difficulty of the title, they should have returned the negro to the plaintiff, and put him back into the same condition he was before

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the sale. A discount is a cross action on the warranty. If the defendants had sued on the warranty, could they have recovered more than nominal damages, for this outstanding contingent remainder, the value of which no human tribunal can determine, or even approximate to the true value of it."

[The verdict would seem to have been for the plaintiff for the full amount of the note; and the motion now made in this court, though the grounds of appeal have not been furnished, would seem to have been for a new trial on the part of the defendants.]

CURIA, per EVANS, J. The verdict in this case is right upon two grounds. The warranty is an indemnity against loss, and without loss there can be no claim for abatement in the price, by way of discount. A discount must be something capable of valuation—something which can be estimated in money. There were so many contingencies in this case, and it was so uncertain whether the title would ever prove defective, that I think the jury were right in allowing no abatement in the price.

2. I think, they were at liberty to conclude from the evidence, that when the note was renewed, there was a distinct understanding that every defence which existed before that time was waived. The evidence would have authorised the conclusion, and I know of no rule which requires that a waiver of a contract should be expressed directly in words. An agreement may be proved as well by the conduct of the parties as their words. The defendants are not prejudiced: they knew of the defect of title when they purchased, and if ever the remainder men should become entitled and recover the property, then there will be a clear breach of the warranty, and they can then bring their action.

The motion is dismissed.

RICHARDSON, O'NEALL, EARLE and BUTLER, Justices, concurred.

GANTT, J., *dubitante*.

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WILLIAM BROOKS *ads.* GEORGE W. SULLIVAN, Guardian of
John and C. Glenn.

In an action of assumpsit by plaintiff, as the *guardian* of two infants, his wards, the counts in his declaration stated, in substance, that the defendant had *received* the money of the infants, and in consideration thereof, had promised to pay the plaintiff, their *guardian*. HELD, that the plaintiff could only entitle himself to recover by showing, 1st, his guardianship; 2d, the receipt of the money by the defendant; and, 3d, an express promise to pay the money to him as *guardian*. •

Where money has been received by another belonging to an infant, the promise to pay, which the law *implies* on the part of the receiver, is implied to the infant and not to the guardian of such infant.

Before GANTT, J., at Laurens, Spring Term, 1838.

THIS was an action of assumpsit, for monies had and received by the defendant, belonging to the plaintiff's wards. The following statement of facts is necessary to a correct understanding of the case :

Elizabeth Glenn, the mother of two bastard children, (the plaintiff's wards,) came before General Wright, a magistrate, and swore that Daniel M'Kee, senior, was the father of her two children. A warrant was issued and M'Kee was arrested, and brought before the magistrate. The parties agreed to compromise the matter on the following terms: M'Kee to give his bond to Brooks, to pay by instalments, according to law, the amount prescribed in the act, (£120,) and, that Elizabeth Glenn, the mother, should give to M'Kee a bond of indemnity, to save him harmless from the district. These bonds have been respectively taken up by the contracting parties. Brooks, who joined in the bond to M'Kee, received the amount secured by M'Kee's bond. From a supposed misapplication of the money by Brooks, this action was instituted by the guardian of the wards, for the purpose of recovering the amount received upon the bond of M'Kee, as money belonging to the children.

Brooks *ads.* Sullivan.

On the after marriage of Elizabeth Glenn with Mr. Townes, and previous to it, she made over to the children above, a few articles. These were sold by a constable, to satisfy the debt of another. For this trespass, an action was brought against the constable, in behalf of the children, and a recovery had for \$ —.

The presiding judge charged the jury, on the law of the case, and stated that for the amount paid to Brooks on this bond given to him by M'Kee, the plaintiff as guardian was not entitled to recover. That the object and design of the bond was to pay annually a sum of money for the support of the children, and for a failure on the part of Brooks to comply with the contract, M'Kee alone could proceed for the breach of contract, &c.

For the item, in the bill of particulars, respecting the money recovered in behalf of the children, his honor thought the plaintiff entitled to a verdict. The jury found a much larger amount than this item.

The defendant now moves this court for a nonsuit, on the following grounds: 1. Because, the proof did not support any one count in the declaration. 2. Because, there was no privity of contract between the plaintiff and defendant, either expressed or implied, as laid in declaration. 3. Because, it appeared in evidence, that the funds received by the defendant were in trust for the wards of the plaintiff, and this court has no jurisdiction over the matter: and, for a new trial, 1. Because, the verdict is contrary to law, the evidence, and the charge of the presiding judge. 2. Because, it was clearly proven, that the defendant received the funds in consideration that he would save the putative father harmless against the district, which he complied with, and lifted the bond given for that purpose.

CURIA, per O'NEALL, J. This was an action of assumpsit for money had and received to the plaintiff's use. The declaration contains four counts, viz. 1. For \$991 92, so much money of the said John and Catharine had and received to the plaintiff's use. 2. For \$514 28, for money due the plaintiff's wards on a bond executed by Daniel M'Kee, and which bond the defendant, as agent or next friend of the plaintiff's wards, had collected. 3.

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For money recovered by the defendant, as next friend of the plaintiff's wards, in a suit against one Willis Cheek. 4. For damages sustained by the plaintiff, by reason of the defendant's detention and non-payment of the said several sums of money. The proof upon which the plaintiff recovered, was, that the putative father (Daniel M'Kee) of the wards of the plaintiff, long before the plaintiff's appointment, 23d May, 1823, on being charged on the oath of the mother, with begetting the bastard children, was under a warrant issued by a justice of the peace arrested, and to settle the prosecution, executed a bond to the defendant for the payment of £10 per annum for 12 years; and thereupon, the defendant and the mother executed to M'Kee their bond to indemnify him. This money was to be paid to the defendant, Brooks, in trust for the children. He received the money. As the next friend of John and Catharine Glenn, the defendant, Brooks, received before the plaintiff's appointment, under a recovery had against one Willis Cheek, the sum of \$45. We shall only consider the first ground taken for a nonsuit. One of the plainest rules of pleading is, that a contract must be set out either in its words or according to its legal effect, 1 C. P. 299, or, as Archbold, at 122, states it, contracts must be set forth truly; the slightest variation in substance between the contract laid and that proved will be fatal. This rule, it is true, most generally applies to express contracts; but yet it may reach and govern implied contracts. The three first counts state in substance that the defendant had received the money of the infants, and in consideration thereof, the defendant promised to pay their guardian. The fourth count, being for interest, need not be noticed. Upon the counts framed as the three first are, the plaintiff could only entitle himself to recover by showing three things: 1st, his guardianship; 2d, the receipt of the money by the defendant; and 3d, an express promise to pay the money to him as guardian. The 3d requisite is wholly wanting here, and for the variance the plaintiff must fail; for, the money received is the money of the infants, and to them the law implies the promise—not to their guardian. They must by him, as their next friend and guardian *ad litem*, sue for it: 1 C. P. 291; 2 Saund. 117, f. n. 1. And when once, by

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the judgment of the court, they shall be pronounced entitled to it, then his letters of guardianship will authorise him to direct the collection, and when collected, to receive it.

The motion for nonsuit is granted.

GANTT, EVANS, RICHARDSON, EARLE, and BUTLER, Justices, concurred.

Irby, for the motion.

Sullivan, contra.

JACOB A. GRAHAM *ads.* JACOB L. BECKNER.

In this case, there had been an appeal to this court from the verdict of a jury, upon a question of *fraud*, tried before a commissioner of special bail, under the act of 1833. The appeal court ordered, that on the prisoner's assigning his schedule according to law, he be discharged. The prisoner was subsequently brought before the commissioner, offered to assign over his property, and claimed to be discharged. His application was opposed by the plaintiff, on the allegation principally, that the defendant had not delivered the property in his schedule to the plaintiff, which it was said he had in his possession after his arrest. The defendant offered to deliver to the plaintiff's *attorney* (the plaintiff himself being in another state,) the property and choses in action assigned, except a *black horse*, which had been seized and taken by the sheriff in execution, and left in the defendant's possession, under a bond executed by him and his sureties for the delivery of the horse to the sheriff, for the purpose of sale under the levy. This offer was declined, and the commissioner discharged the defendant, and the plaintiff appealed from the order of the commissioner to this court. HELD, that after an appeal from the verdict of the jury under the act of 1833, has been heard and decided, and the prisoner has been directed to be discharged, upon assigning his schedule, and delivering to the assignee the property mentioned therein, which has been in his power since his *arrest*, the act of 1833 does not give or contemplate *another appeal* to this court, for any supposed error in the commissioner's discharge of this duty.

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Before the act of 1833, no appeal lay, under any circumstances, from the decision of the commissioner of special bail. The legislature, by that act, have thought proper to give the right of *appeal* in a single instance, that of the finding of the jury upon questions of fraud and undue preference, or upon the allegation that the prisoner has gone beyond the prison rules. So far, the jurisdiction of the commissioner of special bail has been divested of its exclusive character; in all other respects, it remains unaltered.

If the commissioner of special bail commits an error in matter of *law*, in the final order of discharge, his error in that respect may be corrected by writ of *certiorari*.

The decision of the commissioner in this case, upon the circumstances stated, said by O'NEALL, J., to be correct.

THIS was an appeal from the order of J. Rosborough, Esq., a commissioner of special bail in Chester District, discharging the defendant from imprisonment. The commissioner's report, which follows, presents all the material circumstances.

"In this case the appeal court had previously ordered that on the prisoner's assigning his schedule, according to law, that he be discharged. The prisoner was brought up before the commissioner, and Mr. Eaves for the prisoner, moved that he be at liberty to assign over his property and be discharged. Mr. M'Allilly, attorney for the plaintiff, objected to his discharge. This case had been fully certified to the appeal court, a copy of the schedule, the suggestion of plaintiff, and the testimony taken on trial, and the verdict of the jury, were all sent on to Columbia, so that the appeal court were put in possession of the merits of the case, together with the report of the commissioner, in which it was stated that payments were made to other creditors after the arrest of the defendant, and as the jury did not find that the payment of the creditors was fraudulent, the prisoner was entitled to his discharge.

The amount of the prisoner's schedule is	-	-	\$ 4743 42
Claims of other creditors fully discharged,	-	-	1803 10
			<hr/>
			\$ 2940 32

Payments proved on trial:

One horse, sold in Kentucky, and received by Beckner,		82 00
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Amount carried forward,	\$ 3022 32
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Amount brought forward,	\$ 3022 32
One horse carried back to Kentucky and sold by Beckner,	75 00
Draft on Commercial Bank of Columbia, paid by Graham,	1200 00
Three horses and a bale of cotton sold by sheriff, - -	160 00
	<hr/>
	\$ 4457 32

Plaintiff's Claims:

Amount sworn to by plaintiff's att'y. in 1st case,	\$ 835 00
Amount sworn to by plaintiff in 2d case,	3550 50
	<hr/>
	4385 50
	<hr/>
	\$ 71 82

From which it appears that the prisoner's schedule amounts to \$71 82, over the plaintiff's claim, after paying the other creditors, named in the schedule.—The prisoner produced a number of notes and accounts, together with his books and horses, named in his schedule, and as far as appeared to the commissioner, was all in his possession, except the notes and accounts before stated, which were given to his creditors, except one black horse, for which he gave his bond and good security for his delivery to the sheriff, on the next sale day, which was deemed sufficient by the commissioner, and the notes, &c., in possession of Brawley and M'Lure, as security, and the plaintiff did not attend to receive the property, and his attorney refused to receive the same, the commissioner was of opinion that he had virtually complied with the law, and in order to carry into effect the opinion of the appeal court, permitted him to assign his property, and Brawley and M'Lure stated that they were ready and willing to deliver over at any time the notes and obligations lodged with them as collateral security as soon as they were indemnified for their debts, and the prisoner said he was ready to deliver over his property which he assigned." The commissioner ordered that the prisoner be discharged.

The plaintiff's attorney gave notice of appeal on the following grounds, to wit: 1. Because, the commissioner erred in discharging the defendant, he, the defendant, not having delivered the property in his schedule to the plaintiff, which property he had in his possession after his arrest. 2. Because, the said order was illegal, and contrary to law.

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CURIA, per O'NEALL, J. In this case, we do not think an appeal lies from the final order of the commissioner of special bail. The act of 1833, in none of its provisions, gives a clear right of appeal. It is only from terms used in the 4th section, and a liberal construction of them, that an implication arises of an intention on the part of the legislature to allow an appeal to either party, from the finding of the jury directed by that act to be impanelled to try questions of fraud and undue preference, or the allegation that the prisoner had gone beyond the prison rules. After an appeal from the verdict has been heard and decided, and the prisoner has been directed to be discharged upon assigning his schedule, and delivering to the assignee the property mentioned therein, which has been in his power since his arrest, the act does not, in any way, speak of another appeal for any supposed error in the discharge of this duty. If an appeal be not given directly, nor by implication, by the act, none can be allowed; for, before the act of 1833, no appeal lay, under any circumstances, from the decision of the commissioner of special bail. The legislature have only thought proper to give the right of appeal in a single instance. So far, the jurisdiction of the commissioner of special bail has been divested of its exclusive character: but in all other respects, it remains unaltered. If the commissioner of special bail commits an error in matter of law, in the final order of discharge, his error in that respect may be corrected by writ of certiorari. *The State v. Senft & Prioleau*, 2 Hill. 367.

On looking into the brief, and a statement made by Mr. Rosborough, the commissioner of special bail, furnished since the argument, I think he did that which was right. By the last document, it seems that the plaintiff had been paid \$2657. 00, out of \$4385 50, leaving due to him \$1728 50: the schedule, with the proceeds of three horses and a bale of cotton sold by the sheriff, amounts to \$1903 42, exceeding the debt to the plaintiff. *Prima facie*, this shows an abundance to satisfy him.

The defendant, it seems, offered to deliver to the plaintiff's attorney (Mr. M'Allilly) the property and choses in action assigned, except a black horse. The offer to deliver to the attorney, when the plaintiff lived in another state, was all which the de-

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fendant could do. So far, therefore, as that went, he was entitled to his discharge. The black horse had been seized and taken by the sheriff in execution, and left in the possession of the defendant, under a bond executed by him and his sureties, for the delivery of the said horse to the sheriff, for the purpose of sale under the levy. The defendant had no power to deliver that which was in the possession of the law. The plaintiff could receive no injury in this respect; for, if entitled to the horse, his remedy under the assignment was plain against the sheriff for the horse, or if sold, for the proceeds.

The motion is dismissed.

GANTT, EVANS, RICHARDSON, EARLE, and BUTLER, Justices, concurred.

Gregg and M'Allilly, for the motion.

THOMAS PERDU v. CHARLES Z. CONNERLY.

In an action of malicious prosecution, the *declaration* charged "that the defendant contriving and maliciously intending to injure the plaintiff, &c. procured *one F. C. Ruff* to appear before the defendant, a justice of the peace, and falsely and maliciously and without any reasonable or probable cause whatever, to make oath," &c. HELD sufficient, after verdict for the plaintiff, on a motion in arrest of judgment.

In the above allegation, the act done by *Ruff* is charged to have been false and malicious and without probable cause, and to have been *procured* to be thus done by the defendant maliciously. The defendant is liable for *Ruff's* act as done by his *procurement*.

If it were necessary in this case to allege that the defendant knew that *Ruff* had no reasonable or probable cause for the charge, this is in effect charged when the defendant is charged with having of his malice procured a *false* and groundless charge to be made, and if defective, is aided after verdict.

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The general rule of pleading is, that all the circumstances necessary for the support of the action should be stated in the declaration ; and in action against one for instituting a groundless and malicious prosecution, through the *agency* of a third person, the averments 1st, of *the agency* of the defendant in causing such third person to make a false charge ; 2d, the charge thus made ; 3d, the arrest of the defendant, his commitment or enlargement on bail to answer the charge ; 4th, the presentation of the bill to the grand jury and their action upon it ; and 5th, the discharge of the plaintiff, and that the prosecution was thus ended, are all that are necessary, and are sufficient.

Before O'NEALL, J., at Newberry, Fall Term, 1838.

THIS was an action against the defendant, for causing a groundless prosecution to be set on foot against the plaintiff, for stealing a pair of martingales. The evidence on the trial and the questions made in the case, will be seen by the following report of his honor, Mr. Justice O'Neill.

"It appeared that the plaintiff had lived with the defendant ; that while living with him, on the day of a general muster at Newberry Court House, the plaintiff wished to buy some articles of merchandize ; that the defendant directed F. C. Ruff & Co. to let him have a hat and bridle. One witness proved that the plaintiff was examining the martingales, and held them up to the merchant, Ruff, or his clerk, and told him if he would take the defendant for pay, he (the plaintiff) would take them : the reply was, that he (the defendant) would be taken. Another witness proved that while the plaintiff was looking at the martingales, the defendant came in, and asked if he was getting the martingales there ? he said yes : he (the defendant) then told him to get them there or at the next house : at last he told him to get them there, (i. e. at Ruff's,) and to stay there until he came back, and they would go on home together. The plaintiff produced and gave in evidence a bill, "C. Z. Connerly for Perdu, to F. C. Ruff & Co," for the hat, bridle, and martingales, receipted by Connerly, on the 17th September, 1836, from the plaintiff. It appeared that a few days before Connerly received payment from the plaintiff for the articles got by him of Ruff, including the martingales, he went to Ruff to obtain from him his bill, to enable him to settle

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with the plaintiff, who was about quitting his employment ; that on referring to his books, Ruff found that he had only charged the hat and bridle. The defendant said that the plaintiff, had a pair of martingales, which he believed he got from that store. Ruff said he told defendant that he had not sold them, that the plaintiff had not got them from him, and that he would not have any thing for them. At the request of the defendant, he put down the martingales at the foot of the bill, but placed no price against them. When the defendant produced the bill to settle with the plaintiff, he asked him if he got the martingales from Ruff, he hesitated a moment, then said yes. The martingales were hunted up to ascertain the price : Connerly placed the price opposite to them, in the bill ; added it up, and received from the plaintiff the amount. On the 23d of Sept. the defendant, who was a justice of the peace for Newberry district, applied to Ruff to make oath that the plaintiff had stolen the martingales ; this he refused to do, until the defendant agreed to carry on the prosecution, and that he (Ruff) should be put to no trouble about it. The oath was then made before the defendant, who issued his warrant, and under it the plaintiff was arrested. Ruff and his clerk, Saxon, both said that they did not sell the martingales to plaintiff ; but both said many persons were in the store during the day, and that they could not recollect every article sold, nor the person to whom sold. Ruff had another clerk, Nicholson, he was that day on parade, and Ruff and Saxon thought he had not returned to the store when the plaintiff was trading with them. The plaintiff, on some occasion, speaking of the defendant's conduct, said, in one sense he did not blame him, in another he did ; by which he meant that he did not blame him for issuing his warrant as a magistrate ; on another occasion the plaintiff said he had no objection to leave the matter to arbitration, as the defendant had done no more than he was obliged to do : this conversation had reference again to his official act and duty. The plaintiff proved a good character. A bill of indictment against him for larceny was preferred to the grand jury, who returned 'no bill.' He was discharged by the court from his recognizance, and thereupon this action was brought.

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I instructed the jury, that to find for the plaintiff, they must be satisfied that the defendant caused the prosecution to be set on foot, and that the prosecution was so set on foot without any reasonable or probable cause. If there was an absence of probable cause, the law implied that the prosecution was malicious. What constituted probable cause was, I told the jury, a question of law; whether it existed, would be a question of fact. I defined probable cause to be, that which would create in a reasonable mind a belief that the charge was true. I put the question distinctly to the jury, "did the defendant, from the facts within his knowledge, have any reasonable or probable cause to believe that the martin-gales were stolen?" Upon this question, I summed up the evidence against and in favor of the defendant, and left it to the jury, as fairly as I was able, withholding any distinct expression of my opinion, which certainly was in favor of the plaintiff. I said to the jury, that if they should believe that the defendant, without any reasonable or probable cause, caused the indictment to be set on foot against the plaintiff, then he would be entitled to recover: how much, was for them to say. The damages were wholly in their discretion.

In conclusion, I said to the jury that, in doing justice, they ought to remember mercy, and not strip the defendant of his all: enough to reinstate the plaintiff, and teach the defendant to pursue a different and a better course for the future, would answer all the ends of justice. It is to this part of my charge, which was to save the defendant from too severe a verdict, and which certainly had the effect to diminish the damages found, that the defendant's third ground applies. How counsel who hear a charge, and who ought to remember it in substance, even if they do not take notes of it, could so misrepresent it, as that ground does, it is difficult to conceive."

The jury found for the plaintiff \$500 damages. The defendant appeals in this case, and now moves the court of appeals in arrest of judgment, for a nonsuit and new trial, on the following grounds: 1. In arrest of judgment: because the declaration does not make such a case as will entitle the plaintiff to recover. 2. For a nonsuit and new trial: because, from the plaintiff's own

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showing, there was sufficient evidence that there was probable cause for the prosecution. 3. Because, the court charged the jury in conclusion, without qualification, that they must find such a verdict as would not strip the defendant of all he was worth, but that would reinstate the plaintiff, and teach the defendant to pursue a different and a better course. 4. Because, the verdict was contrary to law and evidence.

CURIA, per O'NEALL, J. The ground in arrest of judgment is a very general one, and under it, the counsel has presented many objections. It will hardly be necessary to follow him through them all. They may be classed under two heads—defects in substance, and in form. As to the last, if there be any such, (which I have been unable to discover,) it will be enough to say, that all such are aided by verdict. As to the first, I hope to be able, in a very summary way, to satisfactorily dispose of them. Under this head, the defendant contended, 1st, that as the plaintiff had set out the information made by Ruff, charging the felony, he showed good cause for the prosecution, and therefore he had stated himself out of court. If the plaintiff had been guilty of the egregious folly by his record to admit that information to be true, or that the defendant confiding in it, had set on foot the prosecution, then this objection would have been fatal: but, on looking at the declaration, it appears that it charges that the defendant contriving and maliciously intending to injure the plaintiff, &c. procured one F. C. Ruff to appear before the defendant, a justice of the peace, and falsely and maliciously, and without any reasonable or probable cause whatever, to make oath, &c. In this, the act done by Ruff is charged to have been false, malicious and without probable cause, and to have been procured to have been thus done by the defendant, maliciously. There is nothing like an admission of probable cause in this. The defendant is liable for Ruff's act, as done by his procurement; for, in trespass, all who are concerned in any way, are principals. 2. It was contended that it was necessary to allege that the defendant knew that Ruff had no reasonable or probable cause for the charge. This is in effect charged when he is charged with having of his

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malice procured a false and groundless charge to be made. But if it is not sufficiently charged, the proof was ample to that point on the trial, and after verdict a defective allegation will be aided. See note *d.* 2 C. P. 251-2. 8. It was supposed that the description of the indictment was not sufficient. The general rule of pleading is, that "all the circumstances necessary for the support of the action should be stated:" 1 C. P. 255. What circumstances were necessary to be stated in this case? 1st, The agency of the defendant in causing Ruff to make a false charge; 2d, the charge thus made: 3d, the arrest of the defendant—his commitment, or enlargement on bail, to answer the charge: 4, the presentation of the bill to the grand jury—their action by *ignoring* it: and 5th, the discharge of the plaintiff, and the averment that the prosecution was thus ended. This declaration contains all these things; and on being read consecutively, we know that the indictment was presented on the charge made by Ruff: for, it is described thus: "a bill of indictment was presented on the charge aforesaid." In setting out a fact of this kind in the declaration, no greater degree of certainty than "certainty to a certain intent in general," could be demanded: 1 C. P. 237. That which "upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear," is the degree of certainty meant and required. Test the declaration by this rule, and read it, as I have said already, consecutively, and all uncertainty in the description is at an end.

This court has been unable to discover any error in the charge of the judge below. The facts went properly to the jury, and they abundantly justified them in finding the verdict which they did. The motions are dismissed.

GANTT, EVANS, RICHARDSON, EARLE, and BUTLER, Justices, concurred.

Herndon and Caldwell, for the motions.

Fair and Pope, contra.

Executors of Ware v. Murph.

THE EXECUTORS OF EDMUND WARE v. E. MURPH.

The plaintiffs' testator devised among other things, as follows. "It is my will and desire that all the rest and residue of landed and real estate, and of such real estate as may hereafter come to the possession of my executors, now in dispute, and to which I have a claim, be sold by my executors," &c. By another clause, he directs the proceeds of the sales, with other funds, to be applied to the payment of his debts. HELD, that by the will, the executors had a *mere power to sell* the lands, and could not maintain an action of trespass to try title, the *fee* itself being in the heir.

The distinction is between a devise to executors to sell, as if the testator say, "I devise my land to my executors to be sold," and a devise that the executors shall sell, as where the testator says, "I devise or direct that my lands be sold by my executors." In the *first* case, the *fee* passes to the *executors*; in the last, the *fee* passes to the *heir*, to be divested whenever the power is executed by the executors.

A direction to the executors to pay the debts from the proceeds of the sales will not vary the rule.

Before EVANS, J., at Laurens, Fall Term, 1838.

THIS was an action of trespass to try title. The plaintiffs sued as the executors of the last will and testament of one Edmund Ware. The will of Ware *devised* the rest and residue of his lands to be sold by his executors. The defendant moved for a nonsuit, on the ground that the will gave the plaintiffs only a power to sell, and not the *fee* in the land. His honor, the presiding judge, overruled the motion, and the same motion was now renewed in this court, on the ground taken below. The clauses of the will upon which the question in this case depends, will appear in the opinion of the court of appeals.

CURIA, per EVANS, J. This was an action of trespass to try title, tried before me, at Laurens, Fall Term, 1838. The plaintiffs were the executors of Edmund Ware, and claimed to maintain the action in their own right, under certain clauses in their

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testator's will. The 6th clause in the will is as follows: "It is my will and desire, that all the rest and residue of landed and real estate, and of such real estate as may hereafter come to the possession of my executors, now in dispute, and to which I have a claim, be sold by my executors," &c. &c. By the 8th clause, he directs the proceeds of the sale, with other funds, to be applied to the payment of his debts. The question arising on the construction of these clauses is, whether, by the will of Edmund Ware, the fee in the land in dispute passed to the executors, or whether the will gave them a mere power to sell? A motion was made for a nonsuit, which I refused, because I was not fully satisfied on the subject. Since the argument in this court, I have looked into the cases, and have made up a clear judgment, that the motion should be granted. The distinction is, between a devise to executors to sell; as if the testator say, I devise my land to my executors to be sold—and a devise that the executors shall sell, as where the testator says, I devise, or direct, that my lands be sold by my executors. In the first case, the fee passes to the executors; in the last, the fee passes to the heir to be divested whenever the power is executed by the executors. It is supposed that the direction to pay the debts from the proceeds will vary the rule above stated, which is admitted to be the general rule. All the authorities are reviewed by Sugden, in his work on Powers, p. 106; and he says, "there is no authority for this distinction, except a dictum of Sir Matthew Hale," that it had been held, that if a man devises that his land be sold for the payment of his debts, this will give an interest to the executors as well as if he had devised his lands to his executors to be sold. The same principle has been stated in 15 Johnson, 346; but I think the question has been settled in our case of *Ferguson v. King*, 2 N. and M'Cord. 588. There the testator devised his land to be sold by his executors for the payment of his debts; but they were directed to divide, if they should be of opinion it would be best for his estate not to sell the land. The executors neither sold nor divided; and after a lapse of many years, the heirs at law sued to recover the land. It was held they could maintain the action, and the opinion goes on the ground that the fee vested in them, and the

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executors had only a power. The motion for a nonsuit is therefore granted.

GANTT, RICHARDSON, BUTLER, EARLE and O'NEALL, Justices, concurred.

Irby, for the motion.

Young, contra.

ROBERT M'CREIGHT v. DAVID AIKEN.

The old rule was, that a party could not stultify himself: but it is now subject to many modifications, and it may now generally be stated that if a party sought to be charged with a contract, can show that he was so devoid of understanding as to be *utterly* incapable of understanding it, he is not bound by it.

Proceedings in the court of equity, establishing the lunacy of the plaintiff, are admissible to prove the lunacy of the plaintiff, in an action at law by him against a third person not a party to the proceedings.

In chancery, the rule of practice is uniform, that where the committee of a *lunatic* sue for any thing in the right of the lunatic, the committee as well as the lunatic must be made parties. In suits at law, the rule is otherwise. There, the action must be brought in the name of the lunatic *alone*, if of full age; and if under age, by guardian. So, in the case of a *lunatic defendant*, if he be within age, he must appear by *guardian*; and if of full age, by *attorney*.

Before O'NEALL, J., at Fairfield, Fall Term, 1838.

THIS was an action of trover, for the conversion of a great many articles of property; but the case was at last narrowed down to a gig, of the value of \$45. The plaintiff was clearly the owner of that, and unless divested by the defence of the defendant, was entitled to recover. On the 18th of October, 1834, the plaintiff was found to be a lunatic, and from that time forward

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was in the charge of a committee. To establish these facts, the inquisition and proceedings in chancery were admitted in evidence.

In 1835, the plaintiff and his wife removed, against the wishes of the committee, from the plantation of the plaintiff to Winnsborough, and rented a house from the defendant, at the rent of \$65. During the year 1835, the plaintiff's committee was often at the house rented by the plaintiff and his wife; and on one occasion, said to Mrs. M'Creight, if he had known of her intention to remove, that he would have aided her. At the end of the year, the defendant issued a distress warrant, and under that sold the gig for the rent in arrear, and bought it himself.

His honor, the presiding judge, thought, and so instructed the jury, that the plaintiff being a lunatic at the time of his removal to the defendant's house, and so continuing during the time, was not liable to payment; unless his committee had assented to the contract. This last matter was left distinctly to the jury. They found for the plaintiff, \$45, the value of the gig.

The defendant appeals, and moves the court for a new trial, on the annexed grounds: 1. Because, inasmuch as the plaintiff sued in his own name and not by his committee, the court should not have permitted the verdict of the jury of inquest finding the plaintiff a lunatic, to be given in evidence on the trial of the case, to establish the lunacy of the plaintiff. 2. Because, it was substantially established that the plaintiff rented the house from defendant for the year 1835, and was to give him \$65, for the rent of said year; and that the gig, for the value of which the jury found a verdict against defendant, was sold under a distress warrant, in satisfaction of said rent. 3. Because, the committee of said plaintiff, John R. M'Creight, well knew the plaintiff had rented the house from defendant; frequently visited the plaintiff during the year he resided in it, and gave no notice to the defendant of any objection to the contract between plaintiff and defendant respecting plaintiff's occupancy of said house; but rather, on the contrary, led the defendant to believe he was perfectly satisfied with the course pursued by the plaintiff.

CURIA, per O'NEALL, J. In answering the grounds of appeal,
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I will reverse their order, and begin with the last first. It presents a naked question of fact, in answering which, it is supposed, the jury have erred. The facts on which the defendant relies, to show the error, were before the jury, and when compared with the fact that the committee opposed the plaintiff's removal from his own plantation to the defendant's house, were certainly not enough to establish conclusively the fact of assent on the part of the committee, to the renting of the defendant's house. No one can say that the jury were wrong in saying he did not assent.

2. There is no doubt, if the plaintiff had been *compos mentis*, that the defendant's second ground must have defeated the case: but it was too clear to be doubted that he was not, and hence, according to my view of the law, the plaintiff was incapable to contract for rent, and his contract being void, the sale of the gig by distress was illegal, and did not change the right of property. The old rule was, that a party could not stultify himself; but it is now subject to many modifications; and it may now generally be stated, that if a party sought to be charged with a contract can show, that he was so devoid of understanding, as to be *utterly* incapable of understanding it, he is not bound by it. Let us test that rule by this case:—The plaintiff sues for a chattel admitted once to belong to him, and the defendant undertakes to show he has been legally divested of his title to it. To do so, he must prove that the plaintiff rented the house from him: this depends upon a contract. To make a contract, it must be the act of two minds; but if one of the parties have no mind at all—be a lunatic, or *non compos mentis*—there is only one mind, and of course no contract. The truth of the rule is thus proved by the facts of this case; and in proving it by them, it follows that the rule must govern them, and thus, the predicate of the defendant's defence—his contract for rent being destroyed, his whole defence falls with it.

The 1st ground contends, that the proceedings in equity, establishing the plaintiff's lunacy, were not admissible in evidence: but the case of John R. M'Creight v. David Aiken, decided here, December, 1836, shows that they are admissible between parties, other than the lunatic. It would seem to follow, that when he

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was before the court, they would be much more clearly admissible. But under this ground, the defendant's counsel, with his usual tact and ingenuity, contended, that if the committee were not joined with the lunatic, his suit could not be maintained. It is enough to say, that if there was any thing in the objection, it could not avail the defendant here, inasmuch as no such objection was made on the circuit, nor is taken by the grounds of appeal. But I think the action was properly brought, and that the committee need not be joined. All the confusion has arisen from confounding a rule of practice in chancery with one at law. In *Tucker v. Lance*, Term Hill. 14 and 15, car. 11, in Canc., (Cases in Chancery, 19,) it is stated in a note, that when the committee of a lunatic sue for any thing in the right of a lunatic, in such a case, the committee as well as the lunatic are made parties. This rule is uniform in chancery, and all the proceedings in that court are in conformity to it. But, at law, where a person of full age sues, he sues in his own name. The committee of a lunatic derive their authority generally from chancery, and hence, at law, are not necessary parties. It is, however, unnecessary to reason about the matter. In *Cocks v. Darson*, Hobart. 215, the very point was ruled. "Cocks brought an action of trespass, of trover and conversion of beans against Darson; and coming to trial at the assizes upon not guilty, because it was a small cause, *the judge took not the jury,*" but heard the facts, and decided the case. It appeared that the land on which the beans grew was the land of a lunatic and copyhold, and that the lord had granted the custody of the land to one by whose leave and assent the plaintiff did sow the land. It was held, that the action must be in the name of the lunatic, as no interest in the lunatic's land passed by the commitment of the land to the custody of him under whom the plaintiff entered and sowed. The point ruled in that case, that the action, when the right of a lunatic is concerned, must at law be in his own name, has ever since been conceded to be law; and no precedent can be found of the joinder of the committee. The books of pleading are silent as to any such requisite, on the part of the plaintiff. In the case of a lunatic defendant, if he be within age, he must appear by guardian; and by attorney, if of full age: 1 C. P. 529.

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The same rule in substance holds when he is the plaintiff—he must sue by guardian when under age—when of full age, he sues in his own name.—The motion is dismissed.

GANTT, EVANS, RICHARDSON, EARLE, and BUTLER, Justices, concurred.

Clarke and M'Dowall, for the motion.

 ROGERS & THOMPSON v. JOHN S. MOORE.

Independently of the act of 1827, in relation to the action of trover, the doctrine in this state is well settled—"that a verdict for the plaintiff, in trover, changes the property and transfers the *right* to the *defendant*, and makes it liable to be taken in execution for his debts."

The leading case on this subject in this state, is that of *Norrell v. Corley*, decided by the late court of appeals, in December, 1828 (not reported); in which the opinion of the court was delivered by the late Mr. Justice Nott. That was a case in *chancery*, where a bill was filed by the plaintiff in trover, who had recovered at law, to make the property which was the subject of the action, liable to the plaintiff's recovery, in preference to other creditors. The court said "by bringing an action of trover, the plaintiff trusts to the personal credit of the defendant, in the same manner as by taking a note or bond in payment of property sold: the property is changed, even though the money should never be recovered."

The trover act of 1827, is not a declaratory act. The very title of the act, (which is "an act to *alter* the law in relation to the action of trover,") shows conclusively that the legislature supposed the law to be otherwise before, and the whole tenor of the first and important section demonstrates, that the purpose was to provide a *new* remedy in actions *afterwards to be* commenced. The act therefore does not apply to an action of trover commenced *before* the passing of the act.

Before EARLE, J., at York, Fall Term, 1837.

THIS case came up on a special verdict which found substantially the following state of facts. "That an action of trover

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was commenced by the executors of Solomon Hall, in January, 1826. After the trover act of 1827, the plaintiffs, under the provisions of that act, obtained an order for special bail, agreeably to its provisions, by which the defendant was arrested, but never gave bond, and was discharged by the order of the plaintiffs. In 1831, a verdict was obtained in favor of the executors of Solomon Hall, judgment issued and execution lodged, April 4, 1831, after the adjournment of the court. The judgment of the plaintiffs in this action was by confession, on the second of April, 1831, the last day of the term, and execution lodged the same day. The defendant, the sheriff of York district, by virtue of executions in his office, proceeded to levy on the negroes, the subject of this action of trover, and sold them on the 5th of September, 1831, for \$2,263. At October term, 1831, the present plaintiffs ruled the defendant to shew cause why he did not pay over the proceeds of the sale of the negroes to plaintiff's execution; which was dismissed by his honor judge Richardson. The plaintiffs appealed from the decision of the judge, but owing to the fact that the report was lost, the cause was stricken from the appeal docket, and was never heard by that court. After the case was stricken from the docket, and at the same term, the plaintiffs' counsel obtained a further report from judge Richardson, and moved to reinstate the cause on the docket; but the judge saying that he had, of his own knowledge, no particular recollection of the case, and the motion being opposed by defendant's counsel, it was refused. Immediately after, the defendant was notified not to pay over the money to the execution of the executors. The plaintiffs afterwards commenced the present action against the defendant. "If, from the foregoing statement of facts, the court should be of opinion that the plaintiffs are entitled to the proceeds of the sale of the negroes, we find for the plaintiffs, five hundred dollars, with interest from the 1st of January, 1831; if not, we find for the defendant." On this verdict his honor the presiding judge pronounced the following judgment: "On the case made by the foregoing special verdict, it is considered by the court now here, that the plaintiffs are entitled to recover. And it is therefore ordered that the postea be delivered to them."

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The defendant appeals on the grounds: 1. That the decision of his honor judge Richardson, on the question of right, was final and conclusive. 2. That the rendition of the verdict in trover without satisfaction, did not change the right of property in the negroes. 3. That *ex æquo et bono*, the plaintiffs are not entitled to maintain assumpsit for money had and received under the circumstances of this case. 4. That interest is not allowable under the circumstances.

CURIA, per EARLE, J. The right of the plaintiffs to recover in this action, cannot be affected by the circumstances which occurred, in relation to the rule upon the sheriff, formerly obtained at their instance, and which was dismissed on the hearing, by Mr. Justice Richardson. Had the question on the rule been made in this court, it may be doubted whether the same result would not have ensued, on the ground that important questions of property or right will not be determined in such summary way; but the parties will be left to their remedy by action. In the present state of the case, the judgment on the rule does not preclude the plaintiffs.—The other and important question, whether on the case made by the verdict, the *postea* should not be delivered to the defendant, upon the ground that the right of property remained in the plaintiff in trover, until satisfaction; and therefore, that the plaintiffs in this action cannot recover the proceeds of the sale, has been very much debated, and has been forcibly and well argued here. If it were a new question, and this court considered itself at liberty to adopt a rule on the subject, in accordance with its own view of principle and precedent, it is not unlikely that the result might be more favorable to the defendant's motion. Yet, the court intends to express no opinion, that shall shake the authority of the cases * decided on this point, of which *Norrell v. Corley* is the leading one. That case was decided by

* The case of *Norris and others v. Beckley*, decided by the Constitutional Court, in 1818—2 M. Con. Rep., 228, is also a direct authority upon this point, and recognizes the principle laid down in this case. In that case, it appeared that in a previous action of trover, the jury *had* found a verdict for the plaintiff for a certain sum, to be released on giving up the property.

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the late court of appeals, December term, 1828 ; and the opinion of the court was delivered by the late Mr. Justice Nott. The learned judge reviews the authorities, controverting the opinion of Chancellor Kent, that the other is the more reasonable doctrine, and comes to the conclusion that, both on principle and authority, the verdict in trover changes the property, and transfers the right to the defendant, and makes it liable to be taken in execution, for his debts. That was a case in chancery, where a bill was filed by the plaintiff in trover, who had recovered at law, to make the property, which was the subject of the action, liable to the plaintiff's recovery, in preference to other creditors. The court said, " by bringing an action of trover, the plaintiff trusts to the personal credit of the defendant, in the same manner as by taking a note or bond in payment of property sold : the property is changed, even though the money should never be recovered." It has been urged in this court, that the act of 1827 is declaratory ; and as the trial here was afterwards, in 1831, the provisions of that act ought to be held to apply. But the court thinks otherwise. Indeed, in *Norrell v. Corley*, the title of the act is referred to, and recited—" an act to alter the law in relation to the action of trover,"—as conclusive that the legislature supposed the law to be otherwise before. And this court is of opinion now, that the inference drawn by Mr. Justice Nott is reasonable, and conclusive against the motion. Besides, the whole tenor of the first and important section demonstrates that the purpose was to provide a remedy in actions afterwards to be commenced. The defendant therefore cannot avail himself of the benefit of the provisions. As the act affords a remedy for what was certainly a

The defendant, by appeals and injunctions in equity, had caused great delay, and finally tendered back the negroes to the plaintiff, who received them. The plaintiff then brought this suit against the defendant, for the *intermediate* hire, and the court held the action would not lie. Mr. Justice Nott, in delivering the opinion of the court, says : " The action of trover is a remedy by which a person recovers damages for the *conversion* of personal property, but not *the property* itself. It is a well known legal maxim, that a *verdict* in trover vests the property in the defendant, *transit rem judicalem*."

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great evil, in all future cases, the court feels less reluctance in adhering to the decision in *Norrell v. Corley*.

The judgment of the circuit court is affirmed.

GANTT, RICHARDSON, O'NEALL, EVANS, and BUTLER, Justices, concurred.

Hill, for the appellant.

HUGH MULDROW ET AL. *ads.* ALLEN JONES.

If a person having a possessory title to land enters by *force*, and turns out a person who has a naked possession only, the latter cannot maintain *trespass* against the person so entering under *color of title*; and if a person, having a legal right of entry on land, enters by force, though he may be *indicted* for a breach of the peace, yet he is not liable to a private action of trespass for damages at the suit of the person who has no right, and is turned out of possession.

In an action of trespass *quare clausum fregit*, the defendant may justify his entry upon the land, under the plea of the *general issue*, by showing *title* in himself to the freehold.

Before BUTLER, J., at Darlington, Fall Term, 1838.

THE questions arising in this case, will appear fully from the report of his honor the, presiding judge, which is as follows: "This was an action of trespass *quare domum fregit*. It appeared by the evidence of James Jones, that on the 22d of January last, the defendants, with three of defendant Muldrow's negroes, came to the house then occupied by the plaintiff, whilst plaintiff was absent from home. Plaintiff's son was sitting at the mill-pond for ducks with his gun; heard the defendants coming and immediately

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went to the house. Immediately after plaintiff's son had got to the house, defendant Muldrow asked his mother what she was doing there in his possessions; she replied she was not in his possessions, she was in Tom Stephenson's possessions. Muldrow asked plaintiff's son the same question, and he made the same reply. James Jones, the plaintiff's son, then sat the gun he had been using in the corner of the house. Muldrow took it, and another gun which was standing there, said they were his possession and started off with them, saying they were his property. James Jones jumped at another gun lying in the rack and got a pistol also, and told Muldrow if he did not put down the guns he was taking off he (James) would shoot him. Muldrow returned the guns to the corner, and James Jones put his gun back in the rack. James then forewarned Muldrow from touching any thing on the land. Muldrow replied, forewarn hell, I can forewarn as much as you, and ordered his negroes to punch the shingles off of a shed attached to the end of the dwelling house. They obeyed his order. He then called the negroes in the house, where plaintiff's wife was, and he and they began to punch off the shingles, one of which fell on plaintiff's wife. Thomas Plummer, at the suggestion of Muldrow, and upon his promise to stand between him and all danger, assisted in punching off the shingles. When they had finished uncovering the dwelling house in which plaintiff's family were, they stripped the covering off the out houses. The beds were covered with snow and there was snow on the ground. James Jones told Muldrow that that evening's work would probably cost him five hundred dollars; to which he replied, if you sue, go for \$1000, I am able to pay. James Jones, the witness, his mother and his brother George, a boy of about 15 years, were at home. After this, defendants went off together.

Upon his cross-examination, James Jones says that Jac. Gee et al. had recovered against his father and himself this land, and the sheriff had put Mrs. Woods, Gee's tenant, in possession. Witness' father had remained out of possession about a year; as soon as he ascertained that Mrs. Woods had gone out, he took possession. There was nothing in the house when plaintiff took possession; does not know that Muldrow was about taking

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possession when plaintiff went there: but he had taken part of the floor out of the house. Plaintiff had gone there on the 14th, and had remained about eight days, till the 22d, before the trespass. Plaintiff lived ten miles off, had gone down to see Mr. Cole, who lived near there; found the premises unoccupied, and believing it a good opportunity, took possession on Sunday, and sent after his things. Mrs. Woods had fowls on the dunghill and corn in the crib, but had left nothing in the house.

In reply: Thomas Stephenson had lived there before he went to Georgia, and yet claims the land.—Plaintiff went in to take possession under Thomas Stephenson. For a while plaintiff remained in the uncovered house. His mother was poorly at the time and was alarmed. The plaintiff closed.

The defendants offered in evidence the record of a recovery, J. Gee et al. v. Allen Jones and James Jones, in an action of trespass to try title. Verdict for plaintiffs, and twenty-five dollars damages, recovered at October term, 1836. Judgment and writ of *habere facias possessionem*. The clerk and present sheriff say they have searched their offices and cannot find the writ of *habere facias pos.* Wingate, late sheriff, says he does not know where it is, and Mr. Dargan says he made out the writ and gave it to the sheriff, with instructions to execute it. Mr. Wingate said he had sent a deputy named Johnson with it, who returned it executed.

Geo. W. Dargan recalled: says Pleasant R. Gee commenced an action against Jones. It abated,—was revived by his representatives who recovered. He knows that Muldrow had authority from Gee to enter under a parol contract to purchase. The action was carried on by Gee for Muldrow. The heirs of Gee executed a deed to Muldrow for the premises, after the recovery, dated 3d of April, 1837. The recovery was had against Jones as tenant of Gee. The title of Stephenson was not brought in question.

John M'Laughlin: knows the premises in dispute. Mrs. Woods moved out on Saturday, and Jones was in on Sunday morning. Muldrow had moved some of the furniture before Jones came, and Muldrow knew that Jones was there. Jones

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said he held under Stephenson. The place joins the tract of land on which Muldrow lives.

James Cole : Said some oats had been sowed on the land, he could not say by whom. They had been reaped by Jones. Stephenson once owned the land and still claims it. Muldrow complained of Jones, from the time he took possession until he turned him out. Not many days before the trespass, he heard Muldrow say he would turn out Jones, if he had to tear down the house. He said Jones had taken possession while he was still in possession. Witness had rented the land from Muldrow this year, and expects to pay for it if called on ; he had rented it the year before, but did not have it rented at the time Jones entered.

Wiley Jones was not present at trespass, but saw the houses afterwards. Witness assisted plaintiff to cover the house. He went right at it. Plaintiff left the place, was carried to jail, and the house was torn down by Muldrow, who was put in afterward, after the arrest of Jones, by magistrates, who issued a warrant against him for forcible entry and detainer.—This closed the testimony.

As I thought this a case so entirely within the province of a jury, depending altogether on the testimony, I have reported the facts fully, that the court may have an opportunity of understanding the grounds on which the verdict is based. I will now advert to the grounds of exception to my charge : 1. In some introductory remarks, by way of explaining the nature of the action, I remarked that there was not only different kinds of trespasses, but different grades of trespass of the same kind ; that any unlawful entry on another's inclosed lands was a trespass, but not generally regarded of so serious a nature as a trespass on his inhabited domicile ; that the latter approximated more nearly a trespass on the person—a proposition that cannot be very well disputed. But I remarked that every trespass depended on its own circumstances ; and after it had been committed, should be remedied by such damages as a jury should be reasonably authorized to give. And I then detailed the circumstances of the case, saying that defendant had no legal justification for what he

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had done; but that there were many circumstances which should be taken into consideration by way of mitigation—such as that defendant had been lawfully put in possession under a writ of *habere facias possessionem*, against this very plaintiff. And that if plaintiff had again intruded himself into the land, with a view to harrass the defendant by again driving him to his action, it was well calculated to excite and irritate him. That the manner of plaintiff's taking possession ought to be regarded in the same light.—But that if plaintiff had, *bona fide*, undertaken to take possession for Stephenson, his conduct was less odious and reprehensible, particularly as it was admitted that Stephenson's title had never been decided, and was still asserted. I do not understand the defendant's second ground. I characterised the possession of all the parties as well as I could, and admonished the jury against the influence of passionate appeals to their feelings, on account of the treatment of plaintiff's wife. Indeed, I endeavored to control the current which I saw setting against the defendants, as far as I could well do so, by admonition and an appeal to the judgment of the jury." The jury found a verdict for plaintiff of nine hundred dollars.

Defendants appeal, and now move for a new trial on the following grounds: 1. For misdirection to the jury in this, that his honor, the presiding judge, charged the jury, that the action was to be considered as for the recovery of damages for injuries to the person, rather than to the possession of the plaintiff. 2. Because his honor erred in charging the jury, that the possession of the defendant, Hugh Muldrow, was not in question. 3. Because the jury disregarded the evidence, and found contrary thereto in this, that although it was proven that defendant, Muldrow, was in possession of the *locus in quo*, and the plaintiff trespassed on him, yet they found for the plaintiff. 4. Because the jury found contrary to the evidence in this, that when there was no evidence to prove that plaintiff was the tenant of T. Stephenson, the jury assumed that fact; which assumption was necessary to their finding—the plaintiff being clearly a trespasser upon Muldrow, without even an excuse, until his tenancy to Stephenson was established. 5. Because the damages, found by

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the jury, are *enormous*: and the finding in other respects contrary to law and evidence.

CURIA, per BUTLER, J. Before we can subject the rights of the parties in this case to the legal principles by which they are to be governed, we must state the legal positions which they occupied towards each other on the trial below. Several years before the alleged trespass, the plaintiff Jones had been in possession of the premises, as the tenant of one J. Gee. Either denying Gee's title or wilfully holding over after the termination of his lease, Jones refused to deliver possession, and Gee, in the first instance, and his heirs afterwards, brought an action of trespass to try title against him. A recovery was had, on the ground that Jones had entered upon the land as the tenant of Gee, and could not be permitted to claim against the title of his landlord. Whether Jones had acquired any right from Stephen-son during his tenancy did not appear. By a wise and salutary principle of the law, he was bound by his relation to the landlord under whom he had entered, and was not permitted to defeat his title, by any undue advantage which he had acquired whilst he was in possession. When therefore a verdict was recovered against him, and he was removed from the possession of the land in question, by a writ of *habere facias possessionem*, (which was proved to have been done by the sheriff,) he was divested of all advantages which he had acquired before the verdict; unless indeed he had acquired a perfect paramount title to the land by purchase or legal transfer from another. In such case he would run no hazard in asserting his right as plaintiff in an action against any one in possession; or by setting it up after giving his landlord, under whom he had entered, due notice of his adverse possession and title after the termination of his contract as tenant. It would seem that he did neither.

The present defendant, Muldrow, purchased from the heirs of Gee, and is invested with all their title; and is entitled to claim all the advantages which they could have done, were they now in his situation. He would have a right to hold possession against Jones, as to any right that was previously adjudicated

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against him. As soon as Muldrow purchased, he put a tenant (Mrs. Woods) on the land. She continued on it about a year, and at the termination of her lease, on Saturday evening, she left the actual occupation of the house ; leaving on the premises, however, some articles, such as corn, poultry, &c. On Sunday morning, the plaintiff, Jones, took possession of the house. This was some time in the first part of January. Two or three weeks afterwards, the defendants went to the place and unroofed the house, and remained in it until the plaintiff was removed by the order of magistrates and freeholders. He now brings this action for a trespass on his rights whilst he was in possession ; and the question is made—had he in fact any such right as would entitle him to recover for a violation of it, by the conduct of the defendant, who assumed to be the true owner of the land ? If the plaintiff took possession of the land in right of himself, it is evident that he has no title to sustain him. His wife, at the time of the trespass, and he, afterwards, alleged that they held under one Stephenson. This is a mere naked assertion, and although it would go to show the character of the possession, as between Stephenson and the plaintiff, or any one claiming under Stephenson, it is not competent evidence to affect the adverse title of the defendant. Taken in the connexion in which it was made, it is but the declaration of one excusing his trespass or conduct by making testimony for himself. The plaintiff must therefore be regarded as having gone on the place by virtue of his own title, which divests him of all right, and leaves him in the attitude of a naked trespasser, who had secretly intruded himself on the possession of the apparent, and (for aught that this court can say,) the rightful owner. He occupies the position of one who has wrongfully dis-seised the rightful owner, and brings his action against him for a trespass, because of a re-entry with violence. This brings up the legal question, which is fairly involved. In the contest, the defendant occupies the vantage ground of being the owner of the land ; and the plaintiff has no other right than a naked possession, founded upon clandestine intrusion. Every owner of a freehold has a right to use his own estate as he pleases, provided he does not abuse his right to the prejudice of another, or violate the peace

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of the country, in the manner of asserting and maintaining such right. One may very well render himself liable to an indictment to the *state*, for a forcible entry and detainer, by taking possession of his own land; as where he does so with violence and a multitude of people, when he would not be answerable for damages to a trespasser, whom he had forcibly removed from it. No one has a right to recover damages for a trespass to land who has no right or interest in it. Damages are given to compensate for an injury to some legal right. What right has a naked trespasser on land, into the occupancy of which he voluntarily intrudes himself? He has a right to claim an exemption from personal violence, but no right to claim redress for an encroachment on his possession. The legal proposition is, that the true owner of a freehold has a right to take possession of it, subject only to his liability to be indicted for a breach of the peace, for some criminal offence prohibited by the laws of the state; but cannot be made answerable to damages for dispossessing a trespasser divested of all title. This proposition is sustained by elementary authorities, and many adjudicated cases: 3 Blac. Com., 210; 8 Barn. & Cres., 4; 7 T. R., 434—The case quoted from 4 Johns. R. 157, of Hyatt v. Wood, is exactly in point. The case stated is, “that if a person having a possessory title to land enters by force and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering under color of title; and if a person having a legal right of entry on land enters by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages, at the suit of the person who has no right and is turned out of possession.—The case of Myers v. Myers, 1 M’Cord. 306, is also in point, and may be regarded as obligatory authority on this court.

I have only spoken of the apparent position of the parties on the last trial: such may not be their real position. The plaintiff, Jones, alleges that he holds under Stephenson, and that Stephenson has the paramount title to the land. If he can make this appear on another trial, he will occupy a strong position; he will not only have the advantage of actual possession, but he will be fortified with the right. He will then be entitled to the protection

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secured by the law to freehold and habitation. His right to damages will be disputed by none; and what should be their amount, must very much depend on the motives and purposes of the defendants: these will no doubt be understood by the jury.

The final decision of this case depends on another question, upon which it is necessary to deliver the judgment of the court. Has a defendant a right, in an action *quare clausum fregit*, to justify, under the plea of the general issue, by showing title in himself to the freehold? Upon looking into the authorities on the subject, we are satisfied that he can. The question has never been decided in this state, but the English and New-York authorities are full and explicit on the point. In the case of *Dodd v. Kyffin*, 7 T. R. 350, it was decided that a defendant may give evidence of title under the general issue in such action. In the case of *Argent v. Durant*, the point came up again, and was fully argued: the conclusion of the court was, that a defendant could give evidence of *liberum tenementum*, under the general issue—8 T. R. 403. The question seemed to have been conceded in the case of *Hyatt v. Wood*, quoted above, from 4 J. R. 157; and it may now be regarded as settled in this state. From this it will follow, that both parties on another trial will be at liberty to go into evidence of title. The question of damages, therefore, must very much depend on the rights of the parties.

The motion for a new trial is granted.

RICHARDSON, O'NEALL, EVANS, and EARLE, Justices, concurred.

GANTT, J. I dissent in this case from the opinion delivered. Possession is sufficient to support the action of trespass: see *Gambling v. Prince*, 2 N. & M'C. 139. If the defendant, Muldrow, had been disseised in fact, the law furnished him with an adequate remedy to be restored to the possession without resorting to violence, such as was shown here, and which the law abhors.—I think the verdict should stand.

Simms, for the motion.

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JOHN ARCHER v. A. N. M'FALL.

This was an action brought by the plaintiff, *Archer*, against the defendant as Sheriff, for an alleged trespass, in taking out of his possession a negro woman, named *Sarah*, and her two children, and selling them, as the property of one *Van. Lawhon*, under a judgment and execution against the latter, in favor of one *Cherry*. It appeared that *Sarah* was originally the property of *Archer*; that *Van. Lawhon* married the plaintiff's daughter, and that soon after his marriage, he removed from *Archer's*, where he had previously resided, and that *Sarah* went with him, and continued in his possession up to a short time before the levy, with all the usual indications of ownership. *Cherry* was previously a partner of *Van. Lawhon's*, and, after the dissolution of the copartnership, a creditor to a considerable amount, for which he took *Van. Lawhon's* note, and subsequently a confession of judgment, upon which the execution issued under which the property was sold. The jury found a verdict for the defendant, and the court refused to grant a new trial.

In the opinion expressed in this case, the court say "*Archer* had been the owner of the negroes at one time, and to divest him of his title, it was necessary the defendant should have shown some contract whereby his title had been transferred to *Van. Lawhon*, or that he had done some act, by means of which *Van. Lawhon's* creditors had been deceived and defrauded. In this case, the possession of *Van. Lawhon*, as proved was such as would in law be construed a gift, even in a controversy between him and *Archer*, but for the fact which was proved mainly by *Van. Lawhon* himself, (who was a witness in the case,) that the negro came into his possession as a loan; others, however, who knew nothing of this understanding between the parties, had a right to regard *Van. Lawhon* as the owner."

I take it to be well settled by a number of decisions, that if *Van. Lawhon*, thus in possession, acquired a credit upon the faith and confidence that *Sarah* and her children belonged to him, a creditor who trusted under these circumstances, had a right to subject the property to the payment of his debt.—Per EVANS, J.

But to entitle a creditor to this position in such a case, it should be made to appear, 1st, that he is a *subsequent* creditor without notice; and, 2d, that he trusted his debtor on the faith and belief that the property was his.—Per EVANS, J.

Before EVANS, J., at Anderson, Fall Term, 1838.

THE points made in this case, and the facts upon which they
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depend, will appear from the report of the case made by his honor, the presiding judge, which is as follows: "This was an action against M'Fall, as sheriff, for a trespass in selling a negro woman, named Sarah, and her two children, taken out of the plaintiff's possession, and sold as the property of Van. A. Lawhon, who married Lucretia, the plaintiff's daughter. One Samuel Cherry, a creditor of Lawhon's, was the real defendant. Sarah was originally the property of Archer, and the sole question was, whether he had ever parted from his right of property, so as to subject her to the debts of Van. A. Lawhon. There were many witnesses examined on both sides, on the question whether Archer had or had not given Sarah to his daughter before her marriage. The evidence consisted mostly of declarations, which Archer had made to various persons; but this branch of the case, it is unnecessary to report. I thought, myself, the gift was not made out satisfactorily, and it was very clear the decision of the jury on this part of the case was in favor of the plaintiff. All the difficulties of the case arose out of Archer's conduct, subsequent to the marriage of his daughter; and as the grounds in the notice relate to errors in the charge, on this branch of the case, it will be necessary to state it somewhat in detail. Van. A. Lawhon was married in June, 1831. He resided with Archer until December, 1832. During this time, Sarah nursed his child, and some of the witnesses said he seemed to exercise more authority over her than any of the other negroes. After Van. A. Lawhon removed from Archer's, Sarah went with him, and continued in his possession up to a short time before the levy, with all the usual indications of ownership. At public times, the girl was at Archer's for a few days, and on one occasion, she was sent there on account of some suspicions against her, connected with the death of Van. A. Lawhon's child. The evidence, independent of the testimony of Lawhon and his wife, was such as to establish the gift after marriage, but from their statement, it appeared to have been considered by both parties as a loan. Cherry, the creditor, at whose suit the negro was sold, was a merchant at Pendleton. Van. A. Lawhon had been his clerk for many years, and was

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greatly confided in; soon after the establishment of the court for Anderson, they entered into copartnership, in a store to be established at Anderson village, which continued up to January, 1833. By the terms of dissolution, dated 31st January, 1833, Lawhon agreed to pay Cherry \$3600, and to discharge all the outstanding debts; in consideration of which, Cherry released to him all his interest in the effects of the copartnership. Van. A. Lawhon did not perform his part of the agreement, and Cherry was compelled, as one of the firm, to pay \$4708, for which, on the 1st July, 1835, he took Van. A. Lawhon's notes, upon which there was a confession of judgment the 20th February, 1836, a levy in August, and sale in September of the same year, when the notes were given. Cherry took a mortgage, to secure the payment; which was afterwards given up. In this mortgage, Sarah was included; but, according to Lawhon's evidence, at Cherry's request, and with a knowledge on the part of Cherry that he did not claim her under any gift from Archer.

In my charge to the jury, on this part of the case, I said Cherry stood in the position of a subsequent creditor, without notice of Archer's claim. If a father, on the marriage of his child, put property into the child's possession, where it remained under such circumstances as ordinarily attend a gift, a subsequent purchaser or creditor would have a right to subject the property to his contracts, although as between the parent and child, it would amount only to a loan, and therefore, if Cherry knew that Sarah was in Van. A. Lawhon's possession at the time he sold out his interest in the store, and at that time he had not any notice of Archer's claim, then the jury ought to find for the defendant. I explained to them the reasons of this principle of law, that a creditor had a right to look to all the property of which his debtor was the ostensible owner, for the satisfaction of his debt; and it would be a fraud to allow a third person to set up a secret agreement, to defeat the legal presumption of title in the debtor, arising out of the facts of the case. I put Cherry's right to subject this property to the payment of his debt, expressly on the ground, he was a subsequent creditor, without notice, and that he knew the negro was in Lawhon's possession, and therefore might

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be presumed to have trusted him on the faith of it. I did not charge the jury as stated in the 2d and 5th grounds, that if Cherry trusted Lawhon, not on the fact that Sarah was in his possession, but on the confidence which he, Cherry, had in Lawhon, without reference to Sarah, then they might find for the plaintiff. If there had been evidence that Cherry did not trust Van. A. Lawhon on the faith of the property, I should have thought the plaintiff entitled to recover, because Cherry would not be defrauded by taking away the fund upon the faith of which he had given credit.—But to deprive Cherry of this means of satisfying his debt, the fact that he had not trusted to it should be made out by proof, and not by conjecture. I did not therefore think it right to encumber the jury with legal propositions about which there was no proof.—If I was wrong in this, a new trial should be granted. My opinion, as distinctly expressed, was, if Cherry knew that Sarah was in Lawhon's possession, under the circumstances before stated, he had a right to look to her as a means of satisfying his debt, and in the absence of any satisfactory proof to the contrary, should be presumed to have trusted Lawhon on the faith of this, as well as his other property." The verdict was for the defendant.

The plaintiff gave notice of an appeal and now moves the court of appeals for a new trial on the following grounds: 1. Because the court charged the jury in the following words: "If Cherry knew Lawhon had the woman Sarah in possession at the time he sold out his interest in the store—and if he did not have notice of Archer's claim, *then* you should find for the defendant. 2. Because the judge did *not* instruct the jury that if Cherry gave credit to Lawhon, on the confidence he had in him, independent of the woman Sarah, then that they might find for the plaintiff. 3. Because there was no proof whatever that Cherry at the time of the sale of the store interest, *knew* that Lawhon had Sarah in possession at that time. 4. Because the court required the jury to be satisfied that Archer gave notice of his claim to Cherry, or that he knew of plaintiff's claim, before they could find for plaintiff, if he knew at the time of the sale of the possession of Sarah by Lawhon. 5. Because the court did not

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charge the jury that the true question was, whether or not Cherry gave the credit to Lawhon, on the faith of Sarah and her children, or upon the confidence he, Cherry, had in Lawhon, without reference to Sarah; but held the plaintiff bound to prove that Cherry did not know of the possession of Sarah by Lawhon, or that Archer should show at the dissolution notice to Cherry of his claim by Sarah. 6. Because the verdict is contrary to law and the weight of evidence in the case.

CURIA, per EVANS, J. To understand what was the charge to the jury, it will be necessary to state my views of the law, applicable to the case made by evidence. Archer had been the owner of the negroes at one time, and to divest him of his title, it was necessary the defendant should have shown some contract whereby his title had been transferred to Lawhon, or that he had done some act by means of which Lawhon's creditors had been deceived and defrauded. This last point alone it is necessary to consider. This question involves two distinct propositions: 1st, Has Cherry, the creditor of Lawhon, been defrauded? 2d, has this been accomplished by reason of any act of Archer's? In this case, the possession of Lawhon as proved, was such as would in law be construed a gift even in a controversy between him and Archer, but for the fact which was proved mainly by Lawhon himself, that the negro came into his possession as a loan; others however who knew nothing of this understanding between the parties, had a right to regard Lawhon as the owner. Strictly speaking, Lawhon held the negro as a loan, but his possession was such as held him out to the world to be the true owner of the property. I take it to be well settled by a number of decisions, that if Lawhon, thus in possession, acquired a credit upon the faith and confidence that Sarah and her children belonged to him, a creditor who trusted under these circumstances, has a right to subject the property to the payment of his debt. In this view of the case, it is wholly immaterial whether Archer intended to defraud or not, and in justice to him I ought to say no such imputation was cast on him at the trial. It is sufficient that the creditor has been deceived, and that such deception has been

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the result of Archer's permitting Lawhon to have the negro in his possession, under such circumstances as would authorise others to believe he was the owner. But to give a creditor the right to subject Archer's property to the payment of Lawhon's debts, it must be made to appear that such creditor, in truth and in fact, would be defrauded, if Archer were allowed to abstract these negroes from the fund to which the creditor had a right to look for payment when Lawhon became his debtor. To place Lawhon's creditor in this position, I think it should be made to appear to the satisfaction of the jury: 1st. That he is a subsequent creditor without notice, for if his debt had been contracted before the property went into Lawhon's possession, or if he knew the property was a loan and not a gift, there is no pretence to say he trusted on the faith, that Lawhon was the owner, or had been deceived by his apparent ownership. I do not say the notice to the creditor should be explicit notice, such as is required by the case of *Tait v. Crawford*, to dispense with the recording of deeds. But to deprive a creditor of his position as a subsequent creditor, some evidence must be given to satisfy the jury that he did know, or by the exercise of ordinary diligence he might have known, that Lawhon's possession was a mere loan. 2d. That the creditor trusted Lawhon on the faith and belief the property was his. This is a question of fact, and no definite rules can be laid down as to the evidence necessary to establish it. The jury must be left to draw their conclusions from all the facts given in evidence. On the trial, I illustrated this position by saying, if Cherry did not know that the negroes were in Lawhon's possession, he could not have trusted him on the faith that he was the owner. So, also, I would say, if the jury were satisfied from any other fact proved on the trial, that Cherry had not been deceived by Lawhon's apparent ownership, or had not trusted him in reference to this, as well as the other property in his possession, then these negroes of Archer's ought not to be subject to Lawhon's debts.

I have thus, as intelligibly as I can, endeavored to explain and illustrate the principles of law which apply to the case. I intended to charge the jury in conformity with the opinions herein

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expressed. The counsel for the plaintiff, in whose candor I have confidence, think I was misunderstood. If I could believe so, I would, without hesitancy, agree to a new trial. Upon a careful review of my notes of the charge, I am satisfied the legal principles were fully explained and understood by the jury.—The motion is therefore refused.

GANTT, RICHARDSON, BUTLER, EARLE and O'NEALL, Justices, concurred.

Whitner and Henry, for the motion.

Young and Perry, contra.

NATHANIEL GIST, A. V. JETER, and WILLIAM MOORE v. JAMES RODGERS.

James Dugan, by deed dated the 3d of April, 1832, gave to Robert M'Daniel, Nathaniel Gist, Argulous Jeter and William Moore, a large estate, consisting of lands, negroes, stock and debts, to be equally divided among them: "to them and their heirs forever; provided, nevertheless, that the above-named Robert, Nathaniel, Argulous and William pay all my just debts, and furnish myself and my beloved wife, Frances, each, with two hundred dollars annually, to commence from this day." The property went into the possession of the donees, and James Dugan had been dead some years. The plaintiffs in this case, the donees under the deed of James Dugan, found among his papers an instrument of writing, in these words: "Received of James Dugan three negroes, say Judy, Harriet, and Mary, for the special benefit of Park Dugan's children; that is to say, Mary J. Dugan, Jane J. Dugan and Eliza M. Dugan, for *the* *ave* right to said property. Witness my hand and seal, this 9th Jan'y, 1830. (Signed) James Rodgers, Test, J. M. Smith. Price, Judy, \$450—Harriet, \$300—Mary, \$200 = \$950." After the death of James Dugan, the plaintiffs required of Rogers a note for the price of the negroes, which he gave. The present action was on the note, which Rodgers (who was the step-father of Park Dugan's children, and their guardian,) contended he ought not to pay, because the negroes were given by James Dugan to

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Park Dugan's children. The main question in the case was, whether the negroes had been so given? To explain the transaction, and to prove that there was *no gift*, Mrs. Dugan, the widow of James Dugan, was offered as a witness, by the plaintiffs. She was objected to, and the objection sustained in the court below, on the ground of interest. HELD, on a motion for new trial in this court, that Mrs. Dugan was a *competent* witness, and that her testimony should have been received, and a new trial granted on that ground.

Where the interest of a witness is of a doubtful nature, it goes to the credit, and not to the competency. A party has such a direct and immediate interest as will disqualify him, when the necessary legal consequence of the verdict will be to better his situation, either by securing an advantage or repelling a loss: *he must be a gainer or loser by the event.*

I cannot see that Mrs. Dugan will be a gainer or loser by the event of this suit. It is barely *possible* that the loss of this fund will endanger the payment of her annuity.—Per EVANS, J.

Before GANTT, J., at Union, Fall Term, 1838.

THIS case came up on a motion for a new trial. His honor, the presiding judge before whom the cause was tried, makes the following report: "This was an action of debt on two sealed notes—one for \$460, the other for \$950—both bearing date the 4th March, 1833; and the only question growing out of the case respects the consideration of the note for \$950, it being admitted that the plaintiffs were entitled to recover on the note for \$460.

The note of \$950 was obtained by the plaintiffs of the defendant, under the following circumstances: James Dugan, during his life, acquired a considerable property, and having no children, he conveyed all his estate by deed to the plaintiffs, who had intermarried with his step-daughters, the children of his wife by a former husband. Thus entitled to the estate of James Dugan, they found among his papers a written instrument, of which the following is an exact copy: "Received of James Dugan, three negroes—say Judy, Harriet, and Mary; for the special benefit of Park Dugan's children—that is to say, Mary J. Dugan, Jane J. Dugan, and Eliza M. Dugan, for the ave right to said property. Witness my hand and seal, this 9th January, 1830. (Signed) James Rodgers. Test, J. M. Smith. Price, Judy, \$450—Harriet, \$300—Mary, \$200=\$950." On the back of the foregoing

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instrument, is endorsed the following : “ Received of James Rodgers, a note of hand payable the 1st day of January, 1834, drawing interest from the 9th day of January, 1830, in payment for the within named negroes, at \$950 00. Given under our hands and seals, this 4th day of March, 1833. (Signed) William Moore, Nath’l. Gist, A. V. Jeter, Rob’t. M’Daniel.”

“ Park Dugan was the brother of James Dugan, both sons of Thomas Dugan, deceased. James Dugan was the executor of Thomas Dugan ; and it appeared in evidence, that the negroes mentioned in the receipt of Rodgers to the plaintiffs, constituted a part of the estate of Thomas Dugan. James Rodgers married the widow of Park Dugan, and was appointed guardian of Park Dugan’s children. The paper signed by James Rodgers, was written by James Dugan ; and whether it was designed as a gift of the negroes, to the children of his deceased brother, or a sale of them, was the question. From the evidence furnished, and the charge of the court, the verdict was for the defendant, as respects the \$950 note ; and I thought the verdict a righteous and proper one.—The evidence I enclose, to be inspected, if necessary : the important facts made to appear by the evidence, and to which I attached importance, were that the negroes mentioned in the receipt of Rodgers to James Dugan, belonged to the estate of Thomas Dugan ; that *Park Dugan* was one of his representatives, and that James Dugan was *executor* of Thomas Dugan.

The counsel for the defendant contended, that the receipt signed by Rodgers evidenced nothing more than that he had received the negroes mentioned therein, as belonging to the children of Park Dugan. For the plaintiffs, it was insisted that the valuation of the negroes, at the bottom of the receipt, was *per se. proof* of the sale of the negroes, confirmed by James Rodgers, having given his note for the amount.

Whether the 1st and 2d grounds taken for a new trial can avail the plaintiffs, will depend upon the circumstances under which the first witness was allowed to be sworn, and the last not : I refer to my notes for particulars.

On the 3d ground, I have to observe, that the very fruitful imagination of the learned counsel, actuated by too ardent a zeal in a

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cause which would seem to forbid it, has induced him to say what, I feel assured, his liberality will induce him to retract. The phraseology in the receipt was not changed by the court, in the charge to the jury, to suit the construction put upon the instrument, by the presiding judge. In the argument, "the ave" was read "they own," with the writing before me. I stated, that the correct reading would be "they have right," &c.; contractions of that kind being very common in speaking.

On the 4th ground, I stated to the jury, that one of two views, it appeared to me, must necessarily be taken, in giving construction to the receipt, with its accompaniment of value placed on the negroes: either, that it was intended as a donation of the negroes to his brother's children, or, that so much had been paid to the children, of their distributive share of Thomas Dugan, their grandfather's estate.

On the 5th ground, I have to remark, that from the evidence, I was induced to think, that the negroes constituted a part of the estate of Thomas Dugan, and of whose estate James Dugan was executor: that, having a right in law to dispose of the property, James Dugan had either given the negroes to the children of his deceased brother, as property belonging to him, or designed it (as before noticed,) as a payment of what they were entitled to, of their grandfather's estate; and, I stated to the jury, "expressly and distinctly," that no privity existed, in law, between the plaintiffs and the estate of Thomas Dugan, and that they could not, in their individual characters, recover in this action for property belonging to the estate of Thomas Dugan, under the deed of gift by James Dugan to them.

I have no distinct recollection of what was said to the jury, as furnishing matter for the 6th ground; but, I entertain no doubt that I did say, substantially, what is set forth: that if the pleadings had presented the facts as, I had no doubt, they existed, that I would have ordered a nonsuit, on the ground that the plaintiffs had no more right to the property than the foreman of the jury, or the presiding judge.

I have little to remark on the 7th ground. Mr. Hill, the assistant counsel of the plaintiffs, did, as I thought, offer some observations, by way of apology for bringing of the suit, and that the

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plaintiffs would not be entitled to hold the money, when recovered. I did not well understand the motive assigned for bringing the action, by the remarks he made.

On the 8th ground, I am satisfied as to the correctness of the observation stated to have been made by me, although I have no recollection of it. Upon the whole, after making many remarks to the jury, impressed as I was, with a consciousness of the groundless nature of the suit, I concluded by saying to them, that the counsel had put the case on the question of gift or no gift, by James Dugan, of the negroes, to the children of Park Dugan, recommending them to confine their attention to that view, exclusively."

The verdict of the Jury, his honor states, was in favor of the defendant, as respected the note of \$950.

The plaintiffs appealed, and now move this court for a new trial, on the following grounds: 1. Because his honor erred in permitting Mrs. Clark to be sworn as a witness, to prove that the negroes in question had been given to her and her sisters; when it appeared that her husband had indemnified Rogers from any liability on account of the note and interest and costs about this suit; and her husband was in other respects interested in the event of the suit. 2. Because his honor erred in deciding that Mrs. Dugan was an incompetent witness. 3. Because his honor charged the jury, that the receipt for the negroes signed by the defendant, formed the pivot upon which the case must turn, and altered and added to the phraseology of the receipt, so as to suit his own construction of its meaning; saying to the jury, that it should be read in order to be grammatical "that they (meaning the children of Park Dugan) have the right to said property," when no such sentence is to be found in the receipt. 4. Because his honor said to the jury that he would defy the philosophy of man to put any other than one of two constructions on the receipt, "either that Dugan intended the negroes as a donation to Park Dugan's children, or that they have the right (adopting his own phraseology,) to the negroes, because they had descended from their grandfather as a part of their legacy." 5. Because his honor assumed the fact, that the negroes at the date of the receipt, belonged to the estate of Col. Thomas Dugan, and charged the jury expressly and distinctly, as it did not appear

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that the plaintiffs were the executors or administrators of that estate, and James Dugan held the negroes in the character of executor, that the plaintiffs had no right to recover; and stated that Col. Gist, who was a sensible man, must be satisfied of it, it being so plain and obvious. When the defendant rested his defence on the ground that the negroes had been given by James Dugan, thereby acknowledging title in him; and the defendant had given his note for the price of the negroes to the representatives of James Dugan, and the counsel for the defendant, neither by the pleadings or argument in the case, ever once questioned that the right of property was in James Dugan when he delivered the negroes to the defendant. 6. Because his honor charged the jury that if a demurrer had been filed to plaintiffs' declaration, he would have turned the case out of court—when the action was on a sealed note and defendant's signature admitted. 7. Because his honor misunderstood the counsel for the plaintiffs, and said to the jury in so many words, that he could not see what the plaintiffs were suing for, as the counsel admitted that they could not recover; when all that the counsel ever intended to say, or did say, was, that if Rodgers had been guardian of the children of Park Dugan, at the date of the receipt, and had received the negroes in part payment of the legacy due from their grandfather's estate, that this suit would have been unnecessary, as the price would have been accounted for in the court of equity. And when the concluding counsel for the plaintiffs called the attention of the court to the plaintiffs' right to sue, and asked the court to charge expressly on that point, the defendant's attorney on record stated, that he did not insist on that ground, but rested the case on the question of gift or no gift, which was acquiesced in by plaintiffs' counsel, and nothing further said on the subject. 8. Because when his honor was charging the jury that it did not appear to him that these plaintiffs had any right to sue, and his attention was called to the facts proven by Mr. Thomson, that the business of the estate of Thomas Dugan was now the subject of settlement in the court of equity, where the plaintiffs here and the children of Park Dugan were parties, he unhesitatingly said "that those facts had nothing to do with the case." 9. Because the verdict was against law and evidence.

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CURIA, per EVANS, J. There are nine grounds set out in the notice of appeal : but, as there must be a new trial on the second, it is thought unnecessary and improper to express an opinion on any of the others ; and more especially, as they relate mostly to the facts of the case. The second ground is, that the court below erred in rejecting the testimony of Mrs. Dugan.—To understand this ground, it will be necessary to state some of the facts. James Dugan, by deed, dated the 3d April, 1832, gave to Robert M'Daniel, Nathaniel Gist, Argulous Jeter and William Moore, a large estate, consisting of lands, negroes, stock and debts, to be equally divided amongst them—"to them and their heirs forever,"—provided, nevertheless, that the above-named Robert, Nathaniel, Argulous and William pay all my just debts, and furnish myself and my beloved wife Frances, each, with two hundred dollars annually, to commence from this day."—The property went into the possession of the donees, and James Dugan had been dead some years. The plaintiffs found, among James Dugan's papers, an instrument of writing in these words. "Received of James Dugan three negroes, say Judy, Harriet and Mary, for the special benefit of Park Dugan's children ; that is to say, Mary J. Dugan, Jane J. Dugan and Eliza M. Dugan, for *the ave* right to said property. Witness my hand and seal, this 9th January, 1830. (Signed) James Rodgers. Test, J. M. Smith. Price, Judy, \$450 ; Harriet, \$300 ; Mary, \$200, = \$950."

After the death of James Dugan, the plaintiffs required of Rodgers a note for the price of the negroes, which he gave. This action was on the note, which Rodgers (who was the step-father of Park Dugan's children, and their guardian) contended he ought not to pay, because the negroes were given by James Dugan to Park Dugan's children. The main question, as I understand, was whether the negroes had been so given. To explain the transaction, and to prove there was no gift, Mrs. Dugan, the widow of James Dugan, was offered as a witness. She was objected to, and the objection sustained by the court, on the ground of interest. The estate of James Dugan, which was conveyed to the plaintiffs, was a large one, and it is admitted they are all men of wealth.—If James Dugan's estate had been insolvent, and the annuity of

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Mrs. Dugan was charged upon it, and she was likely to lose it, unless the note was recovered, then I could see some force in the objection. Can the decision of this case increase or diminish her annuity, or secure or jeopard the payment of it, according to the deed? Are not the plaintiffs bound to pay, at all events, whether they recover or not? The plaintiffs, by accepting the property, have become her debtors; and has it ever been decided that a creditor is not a competent witness for his solvent debtor? I know of no such case. The only cases which favor any such idea, are cases brought by administrators of insolvent estates. In such cases, a creditor has been held incompetent, because the recovery would create a certain fund out of which his debt would be paid. The case of *Craig v. Cundell*, 1 Camp. 381, was an action of assumpsit by an administrator. The witness said he had a demand against the estate, but no prospect of payment, as the estate was insolvent. Lord Ellenborough said, "at present, the witness has no means of obtaining satisfaction. If the plaintiff succeeds, there will be a fund out of which he may be satisfied. He gives evidence to get money for himself, through the administrator, who may be considered his trustee." Starkie says, (Part 4. 746,) "where the interest is of a doubtful nature, it goes to the credit, and not to the competency. A party has such a direct and immediate interest as will disqualify him, when the necessary legal consequence of the verdict will be to better his situation, by either securing an advantage or repelling a loss. He must be a gainer or loser by the event." The same position is laid down by Buller, J., in *Carter v. Pearce*, 1 T. R. 164. I cannot see that Mrs. Dugan will be a gainer or loser by the event of this suit. It is barely possible that the loss of this fund will endanger the payment of her annuity. The motion is therefore granted.

O'NEALL, EARLE, BUTLER and RICHARDSON, Justices, concurred.
GANTT, J., dissented.

Dawkins, for the motion.
Herndon, contra.

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WILLIAM ROBERTSON v. DAVID MONTGOMERY.

In an action of assumpsit, for the price of two negro slaves, alleged to have been sold by the plaintiff to the defendant, it appeared that the plaintiff had, previously to the bringing of this suit, brought an action of trover against the defendant, for the same negroes, in which the jury had found a verdict for the defendant. The sale, upon which the plaintiff relied in this case, appeared to have been made before the action of trover was commenced. **Held**, that the former recovery in trover, by the defendant, was no *bar* to this action; and the jury, having found for the plaintiff, the court refused to grant a new trial.

EARLE and **BUTLER**, Justices, dissenting—on the ground of the incompleteness of the evidence of sale, and on the fact that the plaintiff had brought trover for the same negroes, thereby disavowing a contract of sale.

Before O'NEALL, J., at Fairfield, Fall Term, 1838.

THIS case came up on a motion for a new trial. The report of his honor the presiding judge is as follows: "This was an action of assumpsit, to recover the value of two negroes, (Bill and Braxton,) sold, as it was alleged, by the plaintiff to the defendant. It appeared that about January, 1833, the defendant sold to the plaintiff the negroes, for \$850; he paid on account of the purchase, (January, 2, 1833,) \$150; for this sum the defendant on that day gave to the plaintiff his note. The plaintiff paid on a debt of the defendant's, and by his request, \$16 25 to Mr. Noble; the defendant is indebted to the plaintiff for leather, \$14 50. The negroes were in the plaintiff's possession two years; at the end of that time, they returned to the defendant's possession, whether under the contract spoken of hereafter, or before it, did not appear. Charles Bell, Esq. proved that the plaintiff came to his house, and asked him to go with him to Monticello, to see the defendant on the subject of these negroes. He went. The defendant said, his son, who had gone to the western country, needed negroes, and he (defendant) wished

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these negroes back, at a fair valuation. The plaintiff said he would name the plaintiff's own brother, Hugh, to fix the valuation: the defendant said they could arrange that afterwards. Nothing further was done or said in his presence. He said these negroes are the same mentioned in an action of trover, brought by this plaintiff, against this defendant, in which the verdict was for the defendant; and that the contract he proved was before that suit was brought.—The hire of the negroes, while in the plaintiff's possession, was shewn to be worth about \$312; their value, at the time the defendant got possession, was proved to be about \$1750. The defendant gave in evidence the record in the case of this plaintiff vs. this defendant, trover for the slaves: verdict for the defendant. He also proved a discount of \$143 60, for work done on a house for the plaintiff. I thought, and so instructed the jury, that the recovery in trover was only conclusive of the question of title to the slaves, in the defendant. Notwithstanding, it might well be, that the plaintiff, before that suit, had sold the slaves to the defendant. It was, however, a circumstance which might satisfy them that the plaintiff did not sell. For if he had sold, he would hardly have brought trover for the slaves.

The question of the sale, as a matter of fact, was fairly submitted to the jury. Having tried the former case, I had a strong belief and impression, from the facts then proved, that if the sale was set up, injustice would be done to the defendant; and with that belief, I have no doubt, that I gave the defendant the benefit of every thing in this case which ought to operate in his favor. The jury found for the plaintiff, \$527 15, which was the balance due to the plaintiff, rating the negroes at \$1,438, and adding thereto the plaintiff's payments, to and for the defendant, and the defendant's indebtedness to the plaintiff, \$180 75, and deducting therefrom the purchase \$850—interest on \$700 not paid, for two years, \$98—and the plaintiff's discount, \$143 60. With the verdict, I have no reason arising out of the facts proved in this case, to say that I am dissatisfied."

The defendant moves for a new trial in this case, on the following grounds: 1. Because, the evidence adduced on the part of the

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plaintiff, clearly proved that there was not a complete contract entered into between the plaintiff and defendant, for the re-sale of the negroes ; and that what did take place between them on the subject, even if understood by the witness, only amounted to an offer, or proposal. 2. Because, there was no evidence that the proposition to re-purchase was ever consummated by the parties ; but on the contrary, there was conclusive evidence, that it was not, by the plaintiff's bringing an action of trover against the defendant for said negroes, after said supposed contract was entered into. 3. Because, there was not a tittle of evidence to establish the fact, that the negroes went into the possession of the defendant, and which was relied upon by the plaintiff as a consummation of the supposed contract, after the time, it was testified to have been made ; but on the contrary from the evidence of the case, it was clear the defendant had said negroes in his possession for a month and upwards, before the said conversation respecting the re-purchase of the negroes took place. 4. Because, the verdict of the jury in favor of defendant in the 'action of trover brought by the same plaintiff against the same defendant for the recovery of said negroes, was a bar to the plaintiff's recovery in the present action ; and the jury ought to have been so instructed by the court. 5. Because, from the circumstances connected with the pleadings on the part of the plaintiff, it is manifest that the plaintiff himself did not regard what had taken place between himself and defendant as amounting to a sale of said negroes from him to defendant.

CURIA, per O'NEALL, J. The former recovery by David Montgomery ads. William Robertson, cannot bar this action. In that case, the title to the slaves was the issue : in this, their value on a sale from the plaintiff to defendant before the former suit, is sought to be recovered. This action admits the title found by that verdict to be in the defendant, and is therefore consistent with it. If it sought to recover the price of slaves sold by the defendant before the former recovery, and the plaintiff's right to recover depended on his title to the slaves, then the recovery in trover would be a bar to the second suit, in another form, for sub-

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stantially the same object. But here, the plaintiff contends that he is entitled to recover an amount which he alleges, and which, the jury have found, that the defendant ought to pay on his contract, to buy the said slaves at a fair valuation, before the former suit was instituted. It may be, for aught which appears, that the defendant succeeded in the former case, on the ground that he had bought the slaves from the plaintiff. If that was so, there would not be two opinions about his right to be paid the price. The possibility that it was so, has been turned into a certainty by the verdict of the jury in this case, finding that a sale was made before the former suit was instituted. The question of a sale of the negroes by the plaintiff to the defendant, was one of fact merely. The witness, Charles Bell, proved the agreement to buy at a valuation; subsequent to this, the negroes are found in the possession of the defendant.—Putting the contract to buy and the subsequent possession together, the fact of a sale is made out. That the slaves were not valued by persons selected by the parties, is no objection to the recovery here. On the proof of the sale made and no price fixed, the plaintiff was entitled to recover as much as the slaves were worth. The jury were to fix that: and have done so by their verdict. My knowledge of the facts proved in the former case, in trover, between these parties, cannot aid the defendant. If he wished the benefit of the testimony which he then adduced, it was his business to reproduce his witnesses: and in this case, to prove by them the facts to which they before testified. Having failed to do so, he can have no benefit in any shape, from my remembrance of the former testimony. For as a witness, I could not speak of it: and if it were offered as testimony, could not be heard. I should be ashamed of my weakness if, as a judge, I supposed it to influence my judgment on the case before me.

The motion is dismissed.

GANTT, EVANS, and RICHARDSON, Justices, concurred.

EARLE, J., dissenting. I think the verdict should be set aside, as unsupported by proof. A proposition to purchase by one, and

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an assent to sell by another, do not make a contract; and here there is nothing more. There is no stipulation as to price; no valuation by the proposed referee; no time, nor mode of payment; and no satisfactory evidence of a delivery of the negroes, in pursuance of the contract of sale. Under such circumstances, I think, the jury should not be encouraged to find verdicts on vague presumptions. The fact, that the plaintiff had brought trover for the same negroes, thereby disavowing a contract of sale, ought to be conclusive against him in this action.

[In this dissenting opinion, BUTLER, J. concurred.]

Clarke and M'Dowall, for the motion.

Buchanan and Gregg, contra.

LARKIN HOLT v. SALMON & STROUD.

By a law of the state of Georgia, demand and notice are dispensed with, and indorsers and assignors of notes are made liable, as securities. By the same act, the holder forfeits his remedy if he does not *sue in three months* after notice to do so. The defendants in this case, who were citizens of South-Carolina, bought a negro from the plaintiff, who resided in Georgia, and transferred by indorsement, to the plaintiff, two notes of one J. J. Logan, in payment. The contract was made in Georgia, but the plaintiff knew the defendants resided in South-Carolina. *Held*, that the contract of indorsement in this case was to be interpreted by the law of Georgia.

Under the 2d section of the law of Georgia, (referred to,) if the plaintiff does not sue within three months after notice to do so, the indorser is discharged. But it is not enough, *it would seem*, for the indorser in such a case, to prove that he has given the plaintiff notice to sue, in order to discharge himself from the indorsement; the burden *rests* upon him to show also that the plaintiff had neglected to sue for *three months* after notice.

The declaration in this case set out the making of the note, the indorsement by defendants, demand and notice, and alleged that the defendants

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became liable to pay, &c. HELD sufficient, in reference to the law of Georgia, which dispenses with demand and notice, and makes the liability of the indorser an absolute and not a conditional one. The allegation of demand and notice, though unnecessary, does not vitiate the declaration, and may be rejected as surplusage.

In a declaration against an indorser, a variance in setting out the name of the maker of the note from that upon the note offered in evidence, would be fatal. But where the declaration, which was not very legibly written, in some places described the maker's name as "Logan," (the true name,) and in other places it seemed more like "Ligan," the court held that it was to be presumed, that the attorney who drew the declaration knew the true name, and that as he had in some places put the name correctly, they would not scrutinize too strictly, in order to turn a party out of court, and that the cause of action was sufficiently set out to be a bar to another suit for the same cause.

Before EVANS, J., at Greenville, Fall Term, 1838.

THE following is the report of his honor, the presiding judge :
"The defendants, who were citizens of this state, bought a negro from the plaintiff, who resided in Georgia, and transferred, by endorsement, two notes of one J. J. Logan in payment. The contract was made in Georgia, but the plaintiff knew the defendants resided in South-Carolina. The defendants told the plaintiff at the time of transfer, he must sue the notes. The endorsement was without date, and the notes were sued in January, 1834. They were lodged with an attorney for collection ; Logan confessed judgment, but ran away, insolvent. Nothing was received, except ten dollars. The notes, after judgment, were lost in the clerk's office, but their loss was proved, and copies of the notes and assignments were produced and proved, by one who saw the assignment made. There was no proof of any notice to the defendants of the failure of Logan to pay, nor of any demand of payment. By a law of the state of Georgia, demand and notice are dispensed with, and indorsers or assignors are made liable, as securities. By the same act, the holder forfeits his remedy against the indorsers, if he does not sue in three months after notice to do so.—I was of opinion the contract was to be interpreted by the Georgia law ; and that it was [not incumbent on the plaintiff to prove, but on the defendants to show, that notice had been given,

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and that the plaintiff had not sued within three months. One Spencer, a witness, said, he came from Georgia in July, 1833. Before he came away, he heard plaintiff say something about notes he had got from Salmon and Stroud, on Logan. Did not know he spoke of these notes. The notes were not sued until January, 1834; and, if this witness spoke the truth, it would seem the defendants had the notes in July before, and the notice to sue was at the time the notes were transferred. According to my view, this was the only question; and the jury were directed to find for the defendants, if they believed the witness. They found for the plaintiff: a motion was made for a nonsuit, on the ground of variance between the note described and the copy given in evidence. I did not think the declaration was very legible, but it was not clear there was a variance, and the motion was refused."

The defendants now renewed their motion for a nonsuit, before this court, on the ground, that the notes given in evidence were not the same as those described in the declaration. If this motion is overruled, the defendants will move for a new trial on the following grounds: 1. Because, the judge charged that the Georgia law ought to prevail in the enforcement of the defendants' liability. 2. No notice of the loss of the notes was given to the defendants. 3. Because, the jury found contrary to evidence. 4. Because, the plaintiff having received notice to sue, it was incumbent on him to prove that he did so within the three months, and that it was proven by defendants that the plaintiff did not sue in that time.

CURIA, per EVANS, J. The grounds upon which the case has been put in this court are, 1st, a variance between the declaration and the proof: 2d, that the plaintiff has declared against the defendants, as indorsers, under the statute of Anne, and not as securities, under the law of the state of Georgia: 3d, that having received notice to sue, the plaintiff should have proved that he did so within three months, as required by the Georgia law. On the ground of variance, I have but little to add to what is said in the report. If there was clearly a variance in setting out the name of the maker of the note, it would be fatal. In some places,

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it is clearly 'Logan;' and in others, it seems more like 'Ligan.' It is to be presumed, the attorney who drew the declaration knew the true name; and, as he has in some places put the name correctly, we ought not to scrutinize too strictly, in order to turn a party out of court. We think the cause of action is sufficiently set forth, to be a bar to another suit for the same cause. The objection stated in the 2d ground is not contained in the notice, and that might be a sufficient reason why we should *not* consider it, as it is more of form than of substance; but, when it is examined well, nothing will be found in it which can avail the defendant. The declaration sets out the making of the note, the endorsement, demand and notice, and if it had gone on to derive the defendant's liability from the statute of Anne, then, I should think, that he must prove every thing necessary to charge him as indorser. But it does not do this. Divested of the unnecessary allegations of demand on the maker and notice to the indorsers, it alleges that the defendants became liable to pay, &c. The law of Georgia, by dispensing with demand and notice, makes the liability of the indorser an absolute and not a conditional one, thereby putting him on the same footing as a security. The only objection to the declaration is, that the plaintiff has averred more than, by the law of the contract, he is bound to prove. This will not vitiate.

It is very clear, by the 2d section of the law of Georgia, if the plaintiff had neglected to sue within three months after notice to do so was given him, the defendants were discharged. The jury were expressly instructed on this point, and their verdict is conclusive. The argument as I understand it, is, that the defendants having proved notice to sue, the plaintiff on his part was bound to show he had done so within three months. My own opinion was then, and is now, that the defendant was bound to prove both parts of the proposition: both were necessary to his defence. But it is unnecessary to decide that point. The whole difficulty was, when did the defendants give notice to sue? The witness who proved the notice did not prove the time, and, I apprehend, the defendants were bound to show the time, in order that the plaintiff might make out his replication, that his action was brought within three months from the notice. All the difficulty on this

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part of the case arose from the fact, that there was no satisfactory proof that the plaintiff did not sue within three months after notice. The existence of this was necessary to discharge the defendants; and if he has failed to establish the fact, it is his fault or misfortune, against which we cannot relieve him.

The motion is dismissed on all the grounds.

GANTT, O'NEALL, EARLE, and BUTLER, Justices, concurred.

Thompson and *Townes*, for the motion.

Perry, contra.

D. D. M'DONALD v. JOSEPH IVY.

In a joint action of trespass, assault and battery, against two defendants, the plaintiff having failed, on the trial, to make out any case against one, on the motion of the defendant's counsel, a nonsuit was entered as to him, and he was examined as a witness for the other defendant, against whom the plaintiff obtained a verdict, upon which he signed judgment and issued execution. The other defendant entered up a judgment of nonsuit, and issued execution for his costs. At a subsequent term, the defendant against whom the verdict had been obtained, made an application to set aside the verdict, judgment and execution, against him, on the ground that, in a joint action against several, the plaintiff cannot be nonsuited by one defendant without the others, and that the plaintiff, in this case, having been nonsuited as to one defendant, this was a legal discharge as to the other defendant. Motion refused.

If the order of nonsuit, obtained by *one of the defendants* in this case, operated in law as a discharge of *the other* defendant, the obvious and proper course was, to claim the benefit of it at the moment, either by making a motion for nonsuit in the case of the other defendant, on the ground, that if the plaintiff be *called* as to one, he is called as to all; or, by asking leave to plead it in bar of the action, as a legal discharge.

The practice, both here and in England, is to grant relief, on motion or rule to show cause, in many cases where, formerly, the party would have been driven to his *audita querela*, or to his writ of error; but in neither of

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these modes would the party be allowed to reverse a judgment, or to set aside a verdict for any matter of exception on the score of irregularity, or any matter of discharge in point of law, which not only existed, but was fully apparent, and within his knowledge at the time.

It would be an extraordinary proceeding, if, after having at the defendant's instance, granted his motion to nonsuit the plaintiff as to one of the defendants, in order to make him a witness for the other, the court should deprive the plaintiff of the benefit of his verdict, even supposing the irregularity to exist; and inasmuch as the defendant did not avail himself of it, but proceeded in the trial, if it were necessary to preserve the symmetry of the record, the court would rather grant a rule to set aside the judgment of nonsuit, and send the other defendant also to a jury.

Had the defendant attempted to avail himself of the nonsuit as to the other defendant, at the trial of the case against himself, the court would, of course, if the objection were deemed valid, have *then* set aside the judgment of nonsuit, and put the case to the jury.

According to the English rule of practice, which is the correct one, in a joint action against several defendants, the plaintiff must be nonsuited as to all, or none; so, if the plaintiff has obtained a judgment by default, (or otherwise) against one defendant, he cannot be nonsuited by another defendant; but upon an issue in fact, the case must go to the jury as to him.

Before BUTLER, J., at Marlborough, Fall Term, 1838.

THE plaintiff brought a joint action of trespass, assault and battery, against Joseph Ivy and Gade Ivy. On the trial, at March term, 1838, before Mr. Justice Earle, the plaintiff having failed to make out a case against Gade Ivy, at the motion of defendant's counsel, a nonsuit was entered as to him, and he was examined as a witness for the other defendant; and there was a verdict for the plaintiff, on which he signed judgment and issued execution.—Gade Ivy also signed judgment of nonsuit, and issued execution for costs. At October term, 1838, before Mr. Justice Butler, the defendant, Joseph Ivy, made an application to set aside the verdict, judgment and execution for the plaintiff, on the ground that in a joint action against several, the plaintiff cannot be nonsuited by one, without the others; and, that having been nonsuited as to Gade Ivy, this was a legal discharge as to the other defendant. His honor overruled the motion, and, by appeal, it was renewed on the same ground.

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CURIA, per EARLE, J. This seems to be a proceeding entirely anomalous, and I do not think any precedent can be found for it, in any book of reports. On the trial of a joint action of trespass against two, it appeared to the court, that there was no evidence to charge one. Whether the pleading was joint or separate does not appear; but they were defended by the same counsel, on whose motion a judgment of nonsuit was entered, as to that defendant against whom there was no proof. If such an order produced the result now claimed for it, and operated in law as a discharge of the other defendant, the obvious and proper course was to claim the benefit of it, at the moment, either by making the motion for nonsuit in the case of the other defendant, on the ground that if the plaintiff be called as to one, he is as to all; or by asking leave to plead it in bar of the action, as a legal discharge. Upon what principle of law, or what ground of justice and right, can he claim to obtain, on this *ex parte* motion, after verdict, judgment, and execution, without appeal, the benefit of a defence, which he had ample opportunity to make at the trial? I know that the practice now, both here and in England, is to grant relief on motion, or rule to shew cause, in many cases, where formerly the party would have been driven to his *audita querela*, or to his writ of error. But, in neither of these modes would the party be allowed to reverse a judgment, or to set aside a verdict, for any matter of exception, on the score of irregularity, or any matter of discharge, in point of law, which not only existed, but was fully apparent and within his knowledge at the trial. It would be an extraordinary proceeding, if, after having at the defendant's instance, granted his motion to nonsuit the plaintiff as to Gade Ivy, in order to make him a witness, the court should deprive the plaintiff of the benefit of his verdict, even supposing the irregularity to exist; and inasmuch as the defendant did not avail himself of it, but proceeded in the trial, if it were necessary to preserve the symmetry of the record, the court would rather grant a rule to set aside the judgment of nonsuit, and send the other defendant also to a jury. Had the defendant attempted to avail himself of it at the trial, the court would, of course, if the objection were deemed valid, have then

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set aside the judgment of nonsuit, and put the case to the jury. Such I believe to be the most approved, if not the most usual practice, as was lately said by Mr. Justice Parke, in 6 Car. and Pa. 216: "It has been settled, by the unanimous opinion of the judges, that if there is no evidence against any one defendant, at the conclusion of the case, on the part of the plaintiff, such defendant is to be acquitted: before, there had been a discrepancy in the practice." And, *ibid.* 419, it is called 'a new rule.' In our own courts, the practice has likewise been various; and I am very sure, that the question now raised here has never been made before. The authorities relied on do not sustain the defendant's motion; and no case can be found of an arrest of judgment after verdict, on the ground of a nonsuit having been ordered as to one defendant. The case in Sellow's practice, is quoted from Lord Raym. 1372, *Biggs v. Benger et al.* It was trespass, and the point decided was, that although one of several defendants suffers judgment by default, the judgment against him shall be arrested, if it afterwards appear upon the record that the plaintiff was not entitled to maintain the action against any of them. There was a verdict for the other defendant, on an issue made by the pleadings, of license by the plaintiff, which went to the whole right of action. In *Hannah v. Smith et al.*, 3 Term. 662, which was *assumpsit*, it was held, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but he must have a verdict, if the plaintiff fail to make out his case. But there the motion was made by the plaintiff himself, to have leave to enter a nonsuit, which the court refused, because he had a judgment against one. So was the case of *Weller v. Goyton et al.*, 1 Burr. 357, which was also *assumpsit*; and the same point was ruled, that after judgment by default against one, the other could not have his costs taxed on the stat. 14 G. II., as in case of nonsuit, for the plaintiff was not liable to be nonsuited, "having a judgment against one of the defendants already." And in *Powell v. White et al.*, Doug. 168, which was *assumpsit* against several, one was arrested and put in bail, and afterwards signed judgment of *non pros.*, for want of a declaration, the other two defendants not having appeared to the

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writ. On a rule to show cause, the judgment of *non pros.* was set aside, the court being clearly of opinion, that in a joint action the plaintiff could not be non pros.'d by one without the others. And the same point was made in *Philpot v. Muller*, cited in a note to the last case, where, in trespass against two who severed in pleading, one of them signed judgment of non pros., and sued out execution. On a rule, afterwards, at a subsequent term, to show cause, the court held the judgment was irregular ; but being of a former term, could not be reached by motion, and could only be by writ of error. The cases of *Harris v. Batterley et al.*,* and of *Williams v. Rearrs et al.*, 3 M'Cord. 234, are to the same point. From these authorities it is clear enough, that it was irregular to grant a nonsuit as to one defendant, and to put the case to the jury as to the other : and the English rule of practice is the most correct, although it has been common here to enter a nonsuit, or strike out the name of the defendant against whom there is no proof. But the defendant's motion here is not advanced by this admission, and I have only referred to the cases to ascertain the correct practice. In all the cases, the motion has been to set aside the judgment of nonsuit as irregular, when granted as to one defendant, there being a judgment against others ; or, the result has been to refuse a nonsuit as to some in a like predicament as to others. The judgment by default actually obtained, has in no instance been set aside ; and we are brought again to the inquiry, whether the defendant can set aside this verdict and judgment ? and for the reasons already assigned, the court is of opinion that he cannot. If it be necessary to restore the regularity of the proceedings, the proper course would be to set aside the judgment of nonsuit, and enter a verdict for the other defendant. The verdict against this defendant, upon his plea of not guilty, is conclusive upon him, that on the trial of his case, the plaintiff was properly in court. He can take nothing by his motion.

GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, Justices, concurred.

* Cowp. 483.

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WILLIAM WAGNER ET AL. v. ROBERT AITON.

Trespass to try title. The plaintiffs were three out of five of the children and heirs at law of the late William Wagner, who died in January or February, 1813. The plaintiffs claimed under a *grant* to Robert Brown, for one hundred acres, dated 9th November, 1774. The land in dispute had been surveyed under a rule of court, by a deputy surveyor, who stated in his certificate that he had seen the land, and found it to be the same re-surveyed by Robert Bradford, 20th December, 1803; and that he believed it to be a part of the Brown grant. The next regular link in the plaintiffs' chain of title, was a deed from Moses Westbury, dated 20th December, 1799, to one Carter. None of the witnesses knew Westbury; some of them said, that the reputation in the neighborhood was, that he married the only daughter of the grantee, Robert Brown, and that he and his wife removed from the state upwards of *thirty* years ago; probably about the date of this deed to Carter. There was no proof that either had been heard from since. The handwriting of a deceased witness to Westbury's deed was proved, and that the other witness to the same, who had made a mark, was also dead. The same witness proved that the body of the deed was in his (the witness') father's handwriting, who was dead: he also proved the probate to have been made before his father, who was a justice of the peace, and the certificate of registry, signed by Tutt, the clerk of Edgefield, who was dead. This deed conveys the land covered by the Brown grant. A deed from Carter to the late William Wagner, for the same land, dated 18th January, 1802, was proved, and given in evidence. The plaintiff gave in evidence a plat made by Robert Bradford, of the land in dispute, surveyed at the request of Carter, for William Wagner, dated 20th December, 1803. The plaintiffs proved that the Brown grant was regarded, by the neighborhood generally, as covering the land in dispute, and that the late William Wagner had more than five years actual possession prior to 1812, of a field of five, six, or seven acres, on the land in dispute. The defendant claimed under a junior grant to one Adams, dated June, 1786, covering the land in dispute, and deduced a regular paper title; and proved that outside of the lines claimed by the plaintiffs, there had been a continual possession for more than forty years in the defendant, and those under whom he claimed. He proved too, that in the fall of 1811, Mr. Burnet, under whom he claims, dispossessed the tenant of William Wagner of the field of five or six acres, sowed, and reaped a crop of wheat from it. That Wagner was about ploughing up the wheat, in the spring of 1812, when he and Burnet met at the field: Burnet prevented him from doing so, and an arbitration (as it was called) took place, the whole matter about which, was ascertained from the recollection of

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two witnesses, who said that they were at the arbitration. That Lyon, Robertson and Bullock were the supposed arbitrators. One of the witnesses said that they looked at the papers, and said that the Adams title (that under which the defendant claims) was to hold until a better one. The other witness said, the understanding at and of the arbitration was, that Wagner's title would be good if he had Mrs. Westbury's title, otherwise the junior grant (the state title, as he called it) would be good: this was in the summer of 1812, and from that time to Wagner's death, in January or February, 1813, he was generally sick, and, some of the witnesses said, bed-ridden. Burnet hauled away, in the summer of 1812, the rails from around the field, and there had been no possession by any one since, of the land in dispute. The defendant also proved that the plaintiffs, William Wagner and his sister, Elizabeth Davis, asked leave, severally, to cut timber on the land in dispute, from the defendant; and that he accordingly gave them leave. On this evidence, the jury were instructed by the circuit judge, as follows:

1. "That the ordinary proof of location had not been resorted to, to locate the Brown grant, but still the evidence might satisfy them that it covered the *locus in quo*. That the survey by Bradford, made in 1803, under the title deduced from the grantee, was evidence of the location of the Brown grant; for there was no doubt that plat covered the *locus in quo*. So, if they should be satisfied that Wagner, under the Brown grant, had possession, claiming by the boundaries of the Bradford survey, for more than five years, it would afford very satisfactory evidence of the location; and that in a case of this kind, the circumstance proved by the defendant, in making out proof of the award (as it is called), that it was the understanding among all concerned, that if Wagner had Mrs. Westbury's title he would be entitled to the land, might turn the scale in favor of the location contended for by the plaintiffs.
2. That if the plaintiffs' title could be connected with Brown's grant, then he might be entitled to recover; otherwise not. That if the proof satisfied them that Mrs. Westbury was the daughter of Brown, and she and her husband were still alive, then her husband's deed being good for his or her lifetime, would entitle the plaintiffs to recover. If she survived her husband, then it would be that the plaintiffs had not entitled themselves to recover by the paper title. That if Mrs. Westbury was the daughter of Brown, the proof would justify the conclusion that she and her husband had been dead for thirty-two years; both having removed from the state, and not having been heard from since. The legal presumption of their death would be complete in 1806. If their death was thus to be presumed against their heirs, the statute would run out and be at an end in 1811, unless they were shown to be under disability, which was not done, and that the possession of Wagner, of 1806, 1807, 1808, 1809, 1810, 1811, would perfect his title against them. But the true view of the case was, to regard Wagner as having entered under Carter's and Westbury's conveyances, who, for aught that certainly appeared, might be strangers to Brown; but who had undertaken to convey

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his title, and under a title so derived, if he had an actual adverse possession of a part of the grant for more than five years before 1812, that this was equivalent to the most perfect conveyance of the Brown grant to him against all persons not laboring under some disability. That thus having the elder and better legal title, it was not divested by the supposed arbitration, or the asking leave from the defendant to cut timber on the land, by two of the plaintiffs. The fact of possession of more than five years before 1812, under Carter's and Westbury's deeds and Bradford's plat, as connected with the title derived from Carter and the Brown grant, was distinctly submitted to the jury, and they were told that upon it would depend the case."

The jury, under this charge, found a verdict for the plaintiffs for three-fifths of the land in dispute; and on a motion for a new trial, this court concurred fully in the instructions given by the judge below, to the jury, and refused the motion

In relation to the ground, questioning the sufficiency of the proof of *Westbury's* deed, the court say, "That it was all which could be given, and enough to establish the existence of the paper more than thirty years ago. But when it is remembered that, under the title derived from Westbury, there was a survey in 1803, and an actual *pedis possessio*, commencing in 1806, of more than five years, the proof was sufficient to admit Westbury's deed, (which was more than thirty years old,) as an ancient deed, without saying any thing about its execution."

Before O'NEALL, J., at Edgefield, Fall Term, 1838.

THIS case came up on a motion for a new trial. The report of his honor, the presiding judge, is as follows: "This was an action of trespass, to try title. The plaintiffs were three out of five of the children and heirs at law of the late William Wagner, deceased, who died in January or February, 1813. The plaintiffs claimed under a grant to Robert Brown, for 100 acres, dated 9th November, 1774. The land in dispute, had been surveyed under a rule of court, by Wade S. Cothran, deputy surveyor; he stated in his certificate that he had seen the land, and found it to be the same re-surveyed by Robert Bradford, 20th December, 1803; and that he, believed it to be a part of the Brown grant. The next regular link in the chain of title was, a deed from Moses Westbury, dated 20th December, 1799, to Carter: none of the witnesses knew Westbury; Mr. Harrison and others said that the reputation, in the neighborhood, was that he married the only

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daughter of the grantee, Robert Brown—and that he and his wife removed from the state, upwards of thirty years ago, probably about the date of this deed to Carter. There was no proof that either had been heard from since ; one of the witnesses said, that in 1812, at an arbitration hereafter to be spoken of, it was thought to be possible to find Mrs. Westbury. The witness, Mr. Harrison, proved the hand writing of a deceased witness, Mr. Edward Harrison, to Westbury's deed, and that Couch, the other witness, who I think, made a mark, was also dead. He proved, that the body of the deed was in his father's hand writing, who is dead ; he proved the probate to be made before his father, who was a justice of peace, and the certificate of registry, signed by Tutt, the clerk of Edgefield, who is also dead. The deed was read, and conveys the land covered by the Brown grant. A deed from Carter to the late William Wagner for the same land, dated 18th January, 1802, was proved and given in evidence. The plaintiffs next produced and gave in evidence a plat, made by Robert Bradford of the land in dispute, surveyed at the request of Carter for William Wagner, dated 20th December, 1803. The plaintiffs proved that the Brown grant was regarded by the neighborhood generally, as covering the land in dispute : and at the arbitration in 1812, it was conceded, if the plaintiffs' ancestor's title was perfected by legal conveyance of Mrs. Westbury's estate, that then his title to the land in dispute, would be indisputable. The plaintiff's proved by Messrs Rhodes, Kemp, and Thornton, that the late William Wagner had more than five years actual possession prior to 1812, of a field of five, six or seven acres on the land in dispute. On the part of the defendant, it was proved by Mr. Rogers, Mr. Hamilton, and Isaac Burnet, that they did not think the plaintiff's ancestor had possession as long as five years. The defendant claimed under a junior grant, to Adams, June, 1786, covering the land in dispute, and deduced a regular paper title—and proved, that outside of the lines claimed by the plaintiffs, there had been a continual possession for more than forty years, in the defendant, and those under whom he claims. He proved too, that in the fall of 1811, Mr. Burnet, under whom he claims, dispossessed the tenant of William Wagner, of the field of

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five or six acres ; saved, and reaped a crop of wheat from it. Wagner was about ploughing up the wheat, in the spring of 1812 ; he and Burnet met at the field ; Burnet prevented him from doing so, and an arbitration (as it was called) took place. The whole matter about which was ascertained from the recollection of two witnesses who said that they were at the arbitration, Lyon, Robertson and Bullock, were the supposed arbitrators : one of the witnesses, Mr. Rogers, said, that they looked at the papers and said that, " the Adams title (that under which the defendant claims,) was to hold until a better one." Mr. Corley, the other witness, said the understanding was, at and of the arbitration, that Wagner's title would be good if he had Mrs. Westbury's title, otherwise the junior grant, (the state title, as he called it,) would be good. This was in the summer of 1812 ; and from that time to Wagner's death, in January or February, 1813, he was generally sick, and some of the witnesses said, " bed ridden." Burnet hauled away, in the summer of 1812, the rails from around the field, and there has been no possession by any one since, of the land in dispute. The defendant proved that the plaintiffs, William Wagner and his sister, Elizabeth Davis, asked leave severally to cut timber on the land in dispute, from the defendant, and that he accordingly gave them leave. The jury were instructed, 1. That the ordinary proof of location had not been resorted to, to locate the Brown grant. But still the evidence might satisfy them, that it covered the *locus in quo*. I thought, and so stated, that the survey by Bradford, made in 1803, under the title deduced from the grantee, was evidence of the location of the Brown grant : for there was no doubt that plat covered the *locus in quo* ; so if they should be satisfied that Wagner, under the Brown grant, had possession, claiming by the boundaries of the Bradford survey for more than five years, it would afford very satisfactory evidence of the location ; and that in a case of this kind, the little circumstance proved by the defendant in making out proof of the award, (as it is called,) that it was the understanding among all concerned, that if Wagner had Mrs. Westbury's title, he would be entitled to the land, might turn the scale in favor of the location contended for by the plaintiffs. 2.

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That if the plaintiffs' title could be connected with Brown's grant, then he might be entitled to recover, otherwise not. On this part of the case I said to them, if the proof satisfied them that Mrs. Westbury was the daughter of Brown, and she and her husband were still alive, then her husband's deed being good for his or her lifetime would entitle the plaintiffs to recover. If she survived her husband, then it would be that the plaintiffs had not entitled themselves to recover by the paper title. I told them, that if Mrs. Westbury was the daughter of Brown, the proof would, I thought, justify the conclusion that she and her husband had been dead for thirty-two years. For it will be remembered, that in 1799, both removed from the state, and have not been heard from since. The legal presumption of their death would be complete in 1806. If their death was thus to be presumed against their heirs, the statute would run out and be at an end in 1811, unless they were shown to be under disability, which was not done: and that the possession of Wagner, of 1806, 1807, 1808, 1809, 1810, and 1811, would perfect his title against them. But, I thought the true view of the case was, to regard Wagner as having entered under Carter's and Westbury's conveyances, who, for aught that certainly appeared, might be strangers to Brown, but who had undertaken to convey his title, and under a title so derived, if he had an actual adverse possession of a part of the grant for more than five years before 1812, that this was equivalent to the most perfect conveyance of the Brown grant to him, against all persons not laboring under some disability. That thus having the elder and better legal title, it was not divested by the supposed arbitration, or the asking leave from the defendant, to cut timber on the land, by two of the plaintiffs. The fact of possession, of more than five years before 1812, under Carter's and Westbury's deeds, and Bradford's plat, as connected with the title derived from Carter and the Brown grant, was distinctly submitted to the jury, and they were told that upon it would depend the case. Upon this part of the case, the defendant had the full benefit of the supposed arbitration and the asking leave to cut timber, and of every thing like an abandonment of the possessory title, by Wagner, or his heirs.

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The jury found for the plaintiffs, three-fifths of the land in dispute, and \$5 damages; and I think their verdict right."

The defendant appeals and now moves the court for a new trial, on the following grounds: 1. That the Brown grant under which plaintiffs claimed, was not located, by sufficient proof, on the land in dispute. 2. That plaintiffs established no connection in title with the Brown grant, as there was no conveyance from Brown or his heirs; as Westbury, who conveyed to *Carter*, was *not proved to be the son-in-law of Brown*, or to have any interest in the land; as the deed from Westbury to Carter, was not sufficiently proved; as the said deed did not convey the right of Mrs. Westbury. 3. That the possession of plaintiffs could not avail them by way of title, inasmuch as Mrs. Westbury was then alive, and as the possession was abandoned, in pursuance of an award between the parties then claiming, more than ten years ago.

CURIA, per O'NEALL, J. This court concurs fully in the instructions given by the judge below to the jury. It is only necessary to remark on the ground taken, questioning the sufficiency of the proof of Westbury's deed, that it was all which could be given, and enough to establish the existence of the paper more than thirty years ago. But when it is remembered, that under the title derived from Westbury, there was a survey in 1803, and an actual *pedis possessio*, commencing in 1806, of more than five years, the proof was sufficient to admit Westbury's deed (which was more than thirty years old) as an ancient deed, without saying any thing about its execution.

The motion for a new trial is dismissed.

GANTT, RICHARDSON, EVANS, BUTLER and EARLE, Justices, concurred.

Wardlaw and *Wardlaw*, for the motion.

Bausket, contra.

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WILLIAMSON & DUNLAP v. THE SAME.

A. & W. DUNLAP v. THE SAME.

J. A. & W. CARNS v. THE SAME.

These were several actions of assumpsit against the defendants, owners of the "Steamer Atalanta," for the value of certain goods shipped by the respective plaintiffs, and alleged to have been lost, on board the said steamer, plying on the Pedee River, between Georgetown and Cheraw. The defence set up was, that the "Atalanta" sunk by running on a concealed and unknown snag, in the ordinary boat channel, when the river was fairly navigable for steamboats; and that the loss which followed was not in consequence of any want of prudence and diligence on the part of the master and owners. There was a great deal of testimony offered on both sides; by the defendants to sustain, and by the plaintiffs to repel, the grounds of excuse set up: and in some respects, the evidence was conflicting and contradictory. The plaintiffs insisted especially that the defendants had been guilty of negligence after the steamer struck and went down, in not rescuing the goods and forwarding them to their destination. Upon this part of the case, his honor, the presiding judge, charged the jury—"that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged; but that they might be held liable for damages, arising from want of diligence and proper exertions towards saving and delivering the goods on board; and that the jury might regard, as a proper standard of such diligence, such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property, similarly situated." The jury found for the defendants, and a motion for new trial was refused. [RICHARDSON, J., dissenting.]

The general principle is, that the master and owners of boats, on inland navigable rivers, like those of vessels at sea, are *common carriers*; that they are bailees for hire, and bound by the obligations of the law, to deliver goods placed on board their vessel at the place of their destination; unless they are prevented from so doing, by the *act of God*, or *public enemies*.

The bill of lading is the usual evidence of the contract between the owners of the vessel and the freighters. It is a contract, signed by the master for the owners, and subjects them to all the liabilities incident to it. As soon as goods are taken on board, the owners become insurers to a certain extent; and the only causes which will excuse them for the non-delivery of the goods must be events falling within the meaning of one

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of the expressions "the act of God," and "public enemies," unless the contract be specifically qualified and limited. The *perils* usually excepted, and for losses arising from which they are not liable, are those which do not happen by the intervention of man, nor are to be prevented by human prudence; and *losses* arising from them are such as happen in spite of human exertion. /,

It has been decided in this state, that a boat running on an *unknown* and concealed snag, in the regular boat channel of a navigable river, may fall within the excepted perils. [Smyrl v. Niolon, 2 Bail. Rep. 421.]

The most usual contest in cases of *wreck* is, whether the losses from it are to be attributable to the negligence of the master, or are to be regarded as resulting from inevitable accident. When the wreck is inevitable, and a total loss is the immediate consequence, there is little difficulty in applying the general principle of law. In such a case, the master would be absolved from all responsibility. When, however, the injury, in the first instance, happens from the act of God, as by the stranding of a vessel and, after some interval of time, a loss either partial or total, is the ultimate consequence, there is much greater difficulty in deciding on the rights and liabilities of the parties concerned. The conduct of the master or owner then becomes a subject of important consideration. If they be guilty of negligence, they will be held answerable for all the damages which proceed from it. Their duty is, to use all the means within their power and control, to arrest and obviate the consequences of the disaster; and there is perhaps no better rule than that they should be bound to use such *care* and attention as a prudent man would have done in a similar situation, with regard to his own property.

Their duty is to deliver the goods as they were left by the wreck: if not in a sound, in their damaged state. What will excuse them must necessarily depend upon the circumstances peculiar to each case; and, in a great measure, must be a matter of fact to be submitted to the jury. When all reasonable efforts fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the *first* cause, as the *vis major*; upon the ground that when human exertions have failed to obviate its consequences, the "act of God" may still be regarded as continuing its operation.

Before BUTLER, J., at Chesterfield, Fall Term, 1838.

THESE were special actions of assumpsit, to make the defendants liable for the value of goods lost on board of their boat. The report of his honor, the presiding judge, is as follows: "The plaintiffs had shipped from New-York, in the brig Frances Ann, goods to the value of sixteen or seventeen thousand dollars. They were received at Georgetown, S. C. in good order, by their forwarding agent,

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Waterman, who had instructions to send them up the Pedee to Cheraw; from which place they were to be forwarded to plaintiffs, residing in Lancaster, by their agent, Long. Waterman, residing in Georgetown, stood in the double position of being the agent of plaintiffs to receive and forward their goods, and also of being the agent of the defendants to attend to the loading of their boat, the steamer Atalanta, plying on Pedee, between Georgetown and Cheraw. On the 15th and 16th of October, 1836, the plaintiffs' goods were put on board the Atalanta, at Georgetown; on the 17th, she left Georgetown, taking along side of her a tow boat loaded with goods. At the time of her departure, she drew something less than four feet water, and was under the command and care of the following officers and crew: Russel, master, (a white man) Prince; (a slave) Pilot, and Freeman, (a free man of color) engineer, and about twelve or thirteen black men, as the crew. About half way between Georgetown and Cheraw, the Atalanta sunk, at a place called 'the Washers.' When she first sunk she was in ten feet water, her deck being about ten or twelve inches above, but her hold full of water. The great question was, whether she was sunk by inevitable accident, or by some cause which could have been avoided by human foresight and prudence; and, upon this point, the testimony is very voluminous on both sides. A survey was made of the localities, and a map, which was given in evidence on the trial, will explain them to the court. To understand the witnesses, we must suppose ourselves to be going up the river as the boat was; towards the east bank (which is on the right going up,) is a cove, formed by the bend of the river, which is full of snags, known to all navigators of the river; towards the west or left, going up, is a sand bar; and between the cove of snags and the sand bar, is the regular boat channel. A gum tree with a large root, forms the eastern limit of this channel: this root is known and called by the name of the 'Hurricane;' and boats, in pursuing the common channel, run as near this root as possible, without interfering with it; as witness expressed it, they usually graze it with the bow of the boat. The bow of the Atalanta had passed where the limbs of the tree lay, and was within eight or ten yards of

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the root when she sunk—the root being rather to the right of the bow. As the onus was on the defendants, to shew how the boat was sunk, they undertook to show by testimony, that the boat was in the ordinary boat channel, and run on an unknown and concealed snag, at a time when the river was fairly boatable; and that after the accident happened, they used all the diligence in their power to save the goods on board from destruction. For this purpose, they introduced a great deal of testimony. The testimony of Russel, the master, taken by commission, and that of many pilots of boats who were sworn in court, went to show that the Atalanta was in the exact boat channel when she sunk. The master stated that about 3 o'clock on the 18th of October, whilst the boat was under fair way and running slowly, she was arrested by something, and went down in twenty minutes. At the time, the pilot was at the helm, and he by his side, and the engineer at his post; the boat was in the exact channel; had passed down same way and had seen boats, particularly the 'Duncan-M'Cra,' pass precisely the same place with safety, that at this time, there was a little swell in the river which covered the Hurricane, which was, however, indicated by the rippling of the water over it. He said the engine worked well—but that he was unable to move the boat, and that he was confident she was detained by a snag, which was concealed from and unknown to any on board. Whilst the boat was in this situation he despatched a messenger to one of her owners, Mr. Wright, residing in Cheraw. In about eight days, Mr. Wright came down, and got several gentlemen of standing in the neighborhood to take a survey of the boat, and to advise the owners what they had best do for all concerned. He also got several pilots to examine her situation. Upon sounding, she was then in ten feet water, and the river falling. The pilots said the Atalanta was in the exact channel for boats to pass the Hurricane with safety, and that the river, though low, was fairly boatable, and that the boat was on a concealed and unknown snag. The gentlemen who made the survey advised, that the boat should be raised, and the goods sent to Cheraw and sold as soon as practicable. The goods on deck and the tow boat were sent to Cheraw in

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safety. Exertions were made to procure as many boats as could be obtained to assist in carrying off the goods, and to assist in raising the steamer. A man by the name of O'Hanlon, living in Wilmington, N. C. who built the Atalanta, and who was a man of skill and experience in building, launching and raising boats, was sent for. At first he could not come, being sick, but sent some hands perhaps: some time in November he came himself, and made exertions to raise the boat. Four boats and about thirty hands were employed, with machinery made for the purpose. They continued their exertions for about three months, but without success. The effort to raise the boat cost the defendants about five thousand dollars. The boat was so far moved as to loose it from the snag, or impediment that had detained it, and she drifted down the river into a deeper place, where the wreck is now lying. About the time it drifted down, there came a freshet which washed sand over the boat, so as to render it impracticable, in the estimation of the owners, to do any thing to her with advantage; and she was abandoned. In the mean time, some of the goods were taken out and sold, for the benefit of the owners of the goods.

The defendants also introduced testimony to show that the boat was staunch, the master was competent, the pilot experienced, and the engineer skilful.* As to the first officer, it appeared that he had been acting as clerk on board of the M'Cra, and as far as this situation would enable him to do so, he had become acquainted with the navigation of the Pedee, before he had gone on board of the Atalanta, on which he for a while at first acted as clerk. This was his second trip as master. Several witnesses said they would have trusted him as master, for all that a master has to do in the practical navigation of a boat; all saying that the pilot is the principal officer on board. With regard to the pilot, the testimony was very satisfactory, that he was trust-worthy, and distinguished for his vigilance and experience. The engineer had acted on other boats as engineer;

* It was shewn that the boat was well built, staunch, and new, being about two years in service.

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had been on board of this boat before this trip, acting as first fireman ; this was his first trip on the *Atalanta* in which he had charge of the engine. The regular engineer, who was taken sick in going down, said that Freeman was competent, and that the engine was in good order and worked well after the boat sunk. The testimony, on the part of the plaintiffs, went to these points : 1. The master was inexperienced, and the engineer intemperate. 2. The boat was overloaded when she left Georgetown. 3. That she had attempted the navigation when it was too low, and beyond where it was fairly boatable. 4. That the boat was crippled before she reached the Washers. 5. After she sunk, due diligence and prudence were not used to save the goods on board.—On the first, there was some evidence that the master was young, and could not be acquainted with the navigation of the river ; and one or two witnesses said that the engineer was occasionally intemperate. [I think it was shown there was no spirits on board of the boat when the accident happened.] 2. It was shown that the boat was fully laden ; and I think, Waterman said, fuller than he had ever known her before. This was a disputed point, as some witness said that she had drawn more water before than she did on this trip. On the 3d point, much testimony was offered ; two witnesses said the river was lower, at the time of the accident, than they had ever known it for loaded steamboats, and all said the river was low ; several saying, however, it was not too low to pass the Washers, but that it was navigable to a place called the ‘Pocket,’ a place above, for steamboats ; from which place, goods should have been taken up by lighters. All the witnesses agreed that the Washers was a place of unusual peril for boats to pass, and that it required prudence and skill to run a boat through them in a low river. Upon this part of the case, my own mind was not satisfied, as to the prudence and judgment of the defendants. It was certainly proved that the river was quite low. All the pilots said that they would not have attempted to pass the Washers, if the Hurricane could be seen out of water ; but said that if it was covered, the navigation was safe. There was some uncertainty on this point, from the testimony of the witnesses. 4. The captain acknowledged that the boat touched

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the sand bar, about one hundred yards below the Washers, but that it did not affect her course, or impede her motion. One witness, a man by the name of Grice, said that just opposite his house, the steamer was delayed for an hour, and that the crew was making exertions as though they were endeavoring to get her off from some detention at her bottom. That he saw a snag at the place where the boat lay, and underneath where she stopped. [The testimony of this witness was assailed: see my notes of the testimony.]

Another witness said the steamboat stopped about the same place, but how long he could not say: he was at a house, rising one-fourth of a mile off.—5. Plaintiffs contended that goods might have been taken out of the hold of the boat and dried on the land, or carried to a warehouse not far off. Upon this, there was some contrariety of opinion—some witnesses saying that some goods could have been *fished* out of the hold, and others saying it was a more prudent course to have raised the boat, and to have taken all the goods to Cheraw, and I think this was the general opinion; nearly all the witnesses saying, that to have stopped to take the goods out in detail, by hooking, would have jeopardized all opportunity to raise the boat, by which all might have been saved. [It should be here remarked, that it was thought practicable to raise the boat at the time.] At best, there was a choice of difficulties. To attempt to *fish* up the goods, would have resulted in delay, and would have required boats to take them off, which the defendants could not procure at first; having in vain attempted to hire them before O'Hanlon came to raise the boat, and that then it was more prudent to attempt the raising her. The plaintiffs also introduced testimony to show that it was practicable to get out goods a year after the boat sunk, and that defendants should have then taken them out; and on this part of the case, these extraordinary facts were proved: that, in the summer of 1837, long after the boat was abandoned, and when sand and water were five feet over the hold, (which was ten feet deep,) making a depth of fifteen feet water to the goods, several persons undertook to get, and did get goods out of the hold. The way they pursued was, to put down a pole as a guide: to dive down with a sledge-hammer, and knock

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open boxes, as long as they could hold their breath. By repeatedly doing so, several persons got up some guns, nails, and other goods, amounting to five hundred dollars, which they sold, claiming the proceeds for salvage. One or two got lost in the hold, and were very nearly drowned: they were forced, by a rise in the river and the peril of the enterprise, to desist from their exertions.— I charged the jury on all the points: that defendants were subject to the common law responsibilities of common carriers, as modified by judicial decisions, unless they had shown satisfactorily that the loss resulted from *inevitable accident*; from some cause which human prudence and foresight could not have avoided. That it was not enough to show that the boat had run on an unknown snag, in the ordinary boat channel of the river; but that they should show that the boat was properly loaded and managed, and that the river was fairly navigable at the time, for steamboats of the size and burthen of the Atalanta. I thought, myself, that the boat was in the common channel of the river, and had run on an unknown snag, but I had great doubt whether the boat should have been put on the river when it was so low; for, when the river is very low, a boat might run on concealed snags, which it would avoid if the water were high enough to float it above them. I said, perhaps, the snag might have been avoided, by waiting for a higher river. But at the same time, I said this was a question of fact, depending on the testimony; many of the witnesses saying the river was fairly navigable at the time, and but a few saying otherwise; and it was therefore a question for the jury to determine.— Should the jury come to the conclusion that the boat had sunk by inevitable accident, I charged them that the defendants might be still held liable for negligence and want of prudence, in saving and taking care of the goods; that they were bailees for hire, in the peculiar custody of goods, from whom the plaintiffs had a right to expect not only diligence, labor and care, but prudence, enlightened by information, and directed by intelligent exertion; such prudence, as an intelligent man would have used in taking care of his own property of the same amount, and similarly situated. Whether the defendants had thus demeaned themselves, was a question for the jury, that depended very much on

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the opinion and statements of witnesses. It was a question that addressed itself to the sound discretion and deliberate judgment of the jury." The jury, after retiring but a short time, found for the defendants.

The plaintiffs now moved for a new trial, on the following grounds: 1. Because, there was no evidence that the boat was in the proper channel, when she was snagged—if snagged at all. 2. Because, the judge charged the jury, that, after the boat snagged, defendants were discharged of their common law liability as carriers, and became mere bailees of the goods on board, and chargeable only for ordinary neglect. 3. Because, the judge charged the jury, that it was not necessary that the master of the vessel should be acquainted with the navigation of the river, if he had a skilful pilot.

CURIA, per BUTLER, J. The jury have found in this case, that the *Atalanta* sunk by running on a concealed and unknown snag, in the ordinary boat channel, when the river was fairly navigable for steamboats; and that the loss which followed was not in consequence of a want of prudence and diligence on the part of the master and owners: and the material question now made is, did the presiding judge lay down the law correctly, as a guide for the jury, in coming to their conclusion? The charge of the judge, when fully analysed, is this: that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged, but that they might be held liable for damages arising from want of diligence and proper exertions towards saving and delivering the goods on board. The standard of such diligence and exertions, was said to be such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property, similarly situated. This is but a different mode of stating the principle of law which may be deduced from adjudicated cases, as applicable to this case, and in stronger terms than I find it laid down in any of them. The decided cases recognise the general principle of law, and illustrate its practical operation. The general principle is, that the master and owners of boats on inland

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navigable rivers, like those of vessels at sea, are common carriers; that they are bailees for hire, and bound by the obligations of the law, to deliver goods placed on board their vessel at the place of their destination, unless they are prevented from so doing by the act of God, or public enemies. The bill of lading is the contract between the owners of the vessel and the freighters; it is a contract signed by the master, for the owners, and subjects them to all the liabilities incident to it. As soon as goods are taken on board, the owners become insurers to a certain extent, and the only causes which will excuse them for the non-delivery of the goods, must be events falling within the meaning of one of the expressions 'the act of God,' and 'public enemies,' unless the contract be specifically qualified and limited. The perils usually excepted, and for losses arising from which they are not liable, are those which do not happen by the intervention of man, nor are to be prevented by human prudence; and losses arising from them are such as happen in spite of human exertion: 3 Kent's Com. 212, 213, 215. It has been decided in this state, that a boat lost, by running on an unknown and concealed snag in the regular boat channel, may fall within the excepted perils.

The most usual contest in cases of wreck is, whether the losses from it are to be attributable to the negligence of the master, or are to be regarded as resulting from inevitable accident. When the wreck is inevitable, and a total loss is the immediate consequence, there is little difficulty in applying the general principle of law. In such a case, the master would be absolved from all responsibility. When, however, the injury in the first instance, happens from the act of God—as by the stranding of a vessel—and, after some interval of time a loss, either partial or total, is the ultimate consequence, there is much greater difficulty in deciding on the rights and liabilities of the parties concerned. The conduct of the master or owners then becomes a subject of important consideration. If they be guilty of negligence, they will be held answerable for all the damages that proceed from it. Their duty is to use all the means within their power and control, to arrest and obviate the consequences of the disaster; and I know of no better criterion, than that they should be bound to use such care

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and attention as a prudent man would have done in a similar situation, with regard to his own property. Their duty is, to deliver the goods as they were left by the wreck ; if not in a sound, in their damaged state. What will excuse them, must necessarily depend upon the circumstances peculiar to each case ; and, in a great measure, must be a matter of fact to be submitted to the jury. When all reasonable efforts fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the first cause ; as the *vis major*—upon the ground, that when human exertions have failed to obviate its consequences, the act of God may still be regarded as continuing its operation. In the case before us, it is certain that the *Atalanta* continued to be detained, by the snag on which she struck, for several months, in spite of all the exertions that were used to move her ; and, that when she was loosed, she drifted down the river by a freshet, and was covered by the sand. After this, she was abandoned to any one, who might go to the expense or run the risk of saving any goods that were buried in her hold. Whether the best and most effectual means were used by the master and owners to save the goods, is a question full of difficulty and embarrassment. From the cases which I shall quote, I think their conduct should rather be judged of by the actual state of things at the time of the disaster, than by ultimate results. If success had actually crowned their efforts, it would have carried with it its usual fascination and authority, and would have been a sufficient vindication of the present defendants. Failure leaves room for conjecture to say that a different course would have led to different results. If, however, the course had been pursued, which is now indicated by the plaintiffs, and they had sustained a loss by it, they might well have found fault, and have said that defendants should have raised the boat before goods were taken out. It is much easier to criticise the conduct of others than to act well ourselves, in the midst of embarrassing difficulties, such as surrounded defendants when the accident happened.—The cases which I shall now cite, will illustrate these general remarks and propositions. They have generally occurred in contests involving the liability of underwriters, on common marine policies of insurance, and where the defendants have con-

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tended that they were not liable, because the shippers or their agents were. In general, a vessel is doubly insured, when it leaves its port of departure—namely, by a policy of underwriters against the perils of the sea, and by the responsibility of the carriers, to be answerable for all losses that do not arise from such perils. Without saying that it is universal, I think I am safe in saying that it is a general rule, that when the carriers are liable, the underwriters are not; and *vice versa*. In the case of *Cheviot v. Brooks*, 1 J. R., 364, the action was against the master, for not asserting and establishing the plaintiff's right to some cochineal, which he might have done after it had been captured by a British vessel. When the defendant's vessel was captured, by a force ~~which~~ he could not resist, it appeared that all his papers were seized and taken from him; so that he had to rely entirely on his memory for the contents of the papers, in establishing the right to the different things that had been shipped on board his vessel. He saved all from condemnation but the cochineal; he was discharged from liability for this, because the means of claiming and establishing a right to it had been taken away from him, by a cause which could not have been prevented by him; and the loss was attributed to this cause, rather than to his neglect arising from his failure of memory—it appearing that he had not been guilty of bad faith or misconduct. In the case of *Schieffelin v. N. Y. Ins. Co.*, 9 J. R. 21, the action was against the defendants, on their policy to be answerable only for losses from the perils of the sea. There were several causes which may have contributed to prevent and defeat the voyage in this case. It was however said, that the loss might properly be referred to the seizure, as the absorbing and prevailing cause. The remarks of Judge Kent, who delivered the opinion of the court, will throw some light on this case. When a vessel is stranded, a master ought to procure other means to send on the cargo, if he has it in his power; and if he can, and will not, it would seem to be the better opinion that the insurer is discharged. What may be done, ought to be done, when the rights of third persons are essentially concerned in the act. The master is the agent of the insured until a valid abandonment, and they should bear the consequences of his neglect. The

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judge quotes the case from 2 Camp. N. P. 623, in which it was held that the plaintiff could not recover on a policy, where it appeared that there was a ship which the master might have procured to forward the cargo, near the injured ship, and which he neglected to employ. These authorities show that the neglect of the master will exempt the underwriters; but it seems to have been conceded, that where there was no neglect in the employment of means within the reach of the master, that the insurers would have been held liable. The authorities on the subject are fully quoted and commented on, in the case of *Bryant v. Commonwealth Ins. Co.*, 6 Pickering. 143. The opinion of Woodworth, J. is quoted with approbation, in the case of *Treadwell v. Union Ins. Co.* 6 Cowen. 270, who says—"if there be a vessel in the same or contiguous port, the duty of the master to procure it to carry on the cargo, is clear; the rule is imperative, but if resort must be had to distant places, and, independently of procuring a vessel, there are other serious impediments in the way of putting the cargo on board, the rule is not obligatory." The judge who quotes the above, goes on to say, "after all, it becomes a question of reasonable care and diligence on the part of the master, and like all other questions of that nature, after the facts are found, the law arising from them will be pronounced by the court." This fairly brings up the question which was fairly involved in the case under consideration: were the defendants or their agents guilty of negligence in their care and management of plaintiff's goods? If so, they should have been held liable for the damages that were attributable to it after the catastrophe. The jury have found that they used due care and diligence, and all the witnesses (and there were many sworn) except two, said that they approved the defendant's conduct. All seemed to have supposed that it was practicable to raise the boat, and to forward the goods in another boat, to Cheraw. To this object, they directed all their exertions; they employed a skilful man, and put thirty or forty hands under him; were engaged for three months, and spent \$5,000. It is now said that they should have pursued a different course, and should have taken the goods out by hooking them up. All the witnesses who were examined on this point, said it would have

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been imprudent, and perhaps impracticable. At first, there were no boats, upon which the goods could be taken off; and to have taken them on shore by hand, would have placed them in a worse situation than to let them remain in the vessel; as they would be exposed to putrefaction and theft on shore, whilst in doing so, all opportunity of raising the boat would have been lost, by which it was thought that all the goods in the hold might have been saved. The witnesses who gave this opinion were intelligent men, and well informed on the subject of boat navigation. It seems to me, that a court should pause long, before it would undertake to decide otherwise. The jury who heard the case, and the witnesses who were most acquainted with the circumstances, may have been mistaken or unduly biassed. If so, how is that to be corrected? This court will not undertake to direct a jury, peremptorily, how they shall find their verdict. I do not say that it is not competent for the court to do so: I can say, however, that I am not prepared for such a decision.

When the boat was loosed from the snag, or the impediment that arrested and detained it so long, in spite of all the exertions that were used, it was carried down the river by a sudden freshet, and placed in a position from which it would have cost more than it and the cargo were worth to remove them. By every principle of maritime law, the defendants, then, had a clear right to abandon their charge. The goods were then damaged, and worth little: there was not only, technically, a total loss, which is estimated to be the case where the original cargo is destroyed to the extent of fifty per cent., but in this case, there was what might be termed, in fact, an entire loss. The cargo was not worth saving; at least, it was not worth the trouble and risk of reasonable men. The fact that some hardy and adventurous men, a year afterwards, did dive down, at the imminent risk of their lives, and get up some things, should afford no just criterion for prudent men. If the defendants had forced slaves to have gone down in the hold, under such circumstances, and death had ensued, I should have regarded them, in some measure, as guilty of a criminal homicide. No: the law is wiser in its requirements; and this answer may be made to the argument urged—why did not the plaintiffs them-

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selves go and save the goods ? there was nothing to prevent them. Their own conduct is the most satisfactory commentary on such an undertaking. My mind was better satisfied, on the circuit, with the conduct of the defendants after the disaster, than before it. They then pursued the course which prudent men advised, and which none undertook to condemn ; and as I have intimated, their conduct should be judged of at the time they made a choice of an embarrassing alternative, and not by actual and unfortunate results. As in one of the cases put in the books, where a ship is in imminent danger of sinking in the high seas, and there is another ship, apparently of sufficient ability, passing by, the master may remove the cargo into such ship, and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss.

I was not satisfied with the conduct of defendants, before the accident : my impression on the circuit (and it has not been since removed) was, that they put their boat on the river when it was too low, and in consequence of it, the boat ran on an unknown snag. Human temerity should not undertake impossibilities, and attribute the consequences to an act of God. This question, however, has been decided by the verdict of the jury, upon the testimony and opinion of witnesses ; and, upon the whole, I can see no ground for setting aside the verdict.—The motion is therefore refused.

GANTT, O'NEALL, EVANS, and EARLE, Justices, concurred.

RICHARDSON, J., dissenting. The charge against the defendants is, that they have not delivered the goods put on board their boat. The defence is, that the delivery was prevented by the act of God—the unavoidable snagging of the boat ; her consequent sinking in the river, and loss of the cargo ; which, therefore, could not be delivered. The rejoinder is, that although the boat was snagged and partially sunk, yet the cargo remained entire, and might have been delivered, though wet and much injured. The rule of law is plain : if the boat was unavoidably sunk, by an unknown snag, and the cargo thereby *lost*, the carrier is ex-

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cused from the delivery, and the justification of the carrier turns upon the term '*lost*;' not upon the snag piercing the boat—nor upon her consequent depression in shallow water,—nor yet upon the boat being disabled. These must be now assumed to be the acts of God. The boat stood immovable, as if inextricably stranded; but the loss which excuses the carrier, must still, in the words of Chancellor Kent, (vol. 3, 216) be "a *loss*, happening in spite of all human effort and sagacity." And it is not a novel occurrence, or an array of difficulties, that can rid the carrier of this severe but wholesome accountability. Upon the same doctrine of common carriers, Chancellor Kent says, p. 213, "the master is bound to take all possible care of the cargo; and he is responsible for every injury which might have been prevented by human foresight and prudence," &c.; "he is chargeable with the most exact diligence." Upon these two *enactments*—for they stand, for simplicity and clearness, in our laws, like express statutory provisions; and upon their *strict* application to every part of the case before us, and every parcel of the cargo, our decision is to turn. And my opinion must grow out of their application to the extraordinary facts, that have left the *Atalanta* and her cargo, neither sunk nor stranded, but yet fast moored in the channel of the river. This is probably the first instance, in which a carrier, having his boat merely snagged in our fresh water rivers, has claimed to be excused from the delivery of all the goods in the hull of his boat, wet or dry, as if the boat had sunk to the bottom of the ocean, or had been consumed, cargo and all, by lightning. To apply a rule without its meaning, is merely spurious reasoning. The rule of law, which fixes the great liability of carriers, must be regarded with its reasonable limitations; its rationale suggests its proper application, at every turn of the facts. The carrier is excused, by the act of Providence, *for so much*, be it more or less, of the cargo, as is lost or destroyed, or has been the natural and direct consequence of the act, which is pleaded in excuse. For instance, the carrier cannot be entirely exempt from liability, because lightning has burnt the greater part of his cargo, and seared or scorched the rest; he must still deliver the goods that remain, in their damaged state, and would have a right to the

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freight of the goods delivered, in specie. Such goods being delivered, bear freight; but if never delivered, the carrier becomes the insurer, and is liable for the goods, in their deteriorated value. But, to return: when a misfortune constitutes the excuse, such excuse is limited to the natural and essential consequences of such specific misfortune. So far, it is an *estoppel* to the claim for damages, but no farther. The misfortune must constitute a full excuse, amounting to an impossibility for the non delivery of any thing at all; or the carrier is still liable for whatever human power could have rescued. Now, apply this rule of law to the facts.—The boat was snagged on the 18th October, 1836, and sunk to the bed of the river; but her deck remained still a foot above water. Here was no entire loss: and the carrier must show how it became so, still by this act of God. The owner, Mr. Wright, was sent for; he came in eight days, and held a survey: in the mean time, nothing was done to save the goods. The tow-boat and crew of fifteen men lay idle—the river falling too. The deck load was then sent to Cheraw, in the tow-boat: and why, I ask, was she not before, and afterwards too, employed in the same way? Next, O'Hanlon was sent for: he came late in November. In the mean time, and the second time too, nothing farther was done to save the goods. O'Hanlon advised that the boat might be raised: accordingly, they went to work, to raise her; but no attempt was made, at this third period, to save the goods in detail. The scheme may have been worthy of success, but the law of the case is still inflexible. Finally, they failed of raising the boat, and abandoned the attempt to save the cargo in that way, or in any other. At two periods—one, a year afterwards—some strangers went on board, and although the water was then five feet above the deck, they got out a small part of the cargo, valued at \$500. How much more could have been fished up with hooks, or got out, when the water was six feet lower, and was a foot below the deck, no one can now tell: but all was not lost; attempts should have been made; and appearances indicate that much might have been saved by early exertions, and exact diligence and human power. Did the snag in the boat prevent such efforts? Did the accident keep the hatches sealed up, all the time of such

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delay? Assuredly not. But here, the excuse is that O'Hanlon gave counsel to raise the boat, which kept up the indecision of the captain, and the delay in saving what might have been saved, by immediate exertions: and the end is, that the cargo still remains in the wreck. But, by the rule of law, the carrier is bound to show that the delivery of every piece and parcel of the cargo was *estopped*, by the unavoidable occurrence of the boat's sinking, or its unavoidable consequences; or else he must pay for so much as might have been still delivered, according to the diminished value of goods in such a state. And it is plain, that some of the goods now lost might have been saved by the captain and crew. The cargo then has not been *all* lost, by the natural consequences of the misfortune to the boat. But, on the contrary, some, if not a good deal, have been added to the inevitable loss, by omissions, delays, and unlucky councils, which are entirely foreign to, and make no part of the true and natural effects of the specific misfortune, which is set up as a justification for the non-delivery of the entire cargo under deck; but which, in fact, is the excuse for the unfruitful delay that ensued. Upon the whole, then, my opinion is, that the proper legal verdict should have been against the carriers, to a limited extent. That such a verdict would have been the only one concurrent with the just policy and objects of the strict and wholesome laws of common carriers; while the present verdict is against both. Fresh water carriers are not to get rid of their whole responsibility, because their boat sinks; when, in fact, the deck remains above water, and a part of the cargo may be saved. Such a measure of indulgence to erroneous conduct, would infract the legal principle, that nothing but the act of God can justify the non-delivery of the goods confided—but the act of God, or of the enemies of the state; and such examples may fritter away the rule itself, by opening the way for plausible excuses, thus mixed up with the true rule of law, for their shelter and introduction into common practice. On the contrary, the law against common carriers should be carried through every change of the case, and modification in the amount of their responsibility; else the rule itself will soon yield to the popular arbitrament of each particular case, ac-

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according to the merits or demerits of the carrier. It is very possible that I take too strong a view of such consequences ; but "*obsta principiis*" has its place in judicial opinions, and I would send this case back, for the reconsideration of a court and jury, for its magnitude—for its novelty—for its difficulties—and above all, for its principles of law ; which may be easily confounded by the circumstantial facts of a case of such complex considerations, and be too little regarded, in the midst of so much to uphold the general course and conduct of the carriers ; while they are clearly not enough to justify the non-delivery of the whole cargo under deck, and defeat the wholesome legal presumption against common carriers. Why were these goods left as *bona wavata* ? might not the very crew, black and white, have returned the moment of her final abandonment, and helped themselves to the goods ? "The books abound," says Chancellor Kent, "with strong cases of recovery against common carriers, without any fault on their part ; and we cannot but admire the steady and firm support which the English courts have uniformly and inflexibly given to the salutary rules of law, on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case," &c. "The rule makes," he continues, "the common carrier, in the nature of an insurer, and answerable for every loss, not to be attributed to the act of God, or public enemies.—It was introduced to prevent the necessity of going into circumstances impossible to be unravelled."

It is in the spirit of those just observations of Chancellor Kent, that I would judge the present case and send it back, to be reconsidered, according to the well settled presumption of law, in all such cases ; (see 2 Kent., 602-3) which throws the *onus probandi* on the carrier, to exempt himself from liability—1 Term., 27, 33 ; 6 Johns., 160 ; 4 Bin. 127 ; Story's Bail., 338. I would therefore say in this case, what we unanimously said in the case of Patton v. M'Grath, Dud. 161 : "let a jury reconsider the case." Its very *uncertainty* is enough in this politic law of carriers, and casts the loss upon the carrier, lest greater evils should follow.

Williams, for the motion.

Graham, contra.

Boyce & Henry v. D. & J. Ewart.

BOYCE & HENRY v. D. & J. EWART.

Action of assumpsit on a letter of credit or guaranty, in the following words :

"Charleston, 12th October, 1825. Messrs. Boyce & Henry—Gentlemen,—Our brother, Samuel Ewart, is about to commence business on his own account in Columbia. To assist him in which, he will stand in need of your aid and indulgence, which, if you render him, (in case of his failure or delinquency,) we will indemnify you to the amount of four thousand dollars ; and you will greatly oblige, gentlemen, yours, &c., D. and J. Ewart."—HELD, in the opinion of a majority of the court, not to be a *continuing guaranty*, for the amount of \$4000, which S. Ewart might, *at any time* in the course of his mercantile dealings with the plaintiffs, owe them ; but that by its true construction, it could only be regarded as intending to secure the plaintiffs to the amount of \$4000, in any *aid* which they might render S. Ewart, in the *commencement* of his business as a merchant ; and that as soon as S. Ewart, for any dealings had with Boyce & Henry, under the letter of guaranty, paid to the amount of \$4000, D. & J. Ewart were absolved from all further responsibility. [O'NEALL and EVANS, Justices, dissenting.]

The plaintiffs, Boyce & Henry, had dealings to a large amount with S. Ewart, after the date of the letter of guaranty, down to the 6th of January, 1832, when the plaintiffs closed their account current with S. Ewart, and took his note for the balance due them, say \$16,000—payable one day after date. HELD, by a majority of the court, that the statute of limitations commenced to operate from the 6th of January, 1832 ; and that four years from that period, the bar of the statute was complete, and that this suit not having been instituted within four years from the closing of the dealings between the plaintiffs and S. Ewart, the plaintiffs were barred from a recovery in this action, if the circumstances of the case would otherwise have admitted it. [O'NEALL, J. dissenting.]

Before O'NEALL, J., at Richland, Spring Term, 1838.

THE report of his honor, the presiding judge, which presents all the facts in this case, is as follows: "This was an action of assumpsit, on the following letter of guaranty, viz: "Charleston, 12th October, 1825. Messrs. Boyce & Henry—Gentlemen, Our brother, Samuel Ewart, is about to commence business on his own account, in Columbia. To assist him in which, he will stand in need of *your aid and indulgence*, which if you render him, (*in case of his failure or delinquency*,) *we will indemnify you to the amount of four thous-*

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and dollars ; and you will greatly oblige, gentlemen, yours—D. & J. Ewart.” Samuel Ewart, under this letter, commenced and carried on business in Columbia, until June, 1833. The defendants were carrying on business as merchants, on the opposite side of the street to the house occupied by Samuel Ewart, and were admitted to be generally acquainted with his course of business. On the 6th of January, 1832, the plaintiffs closed their account current with Samuel Ewart, and took his note for the balance due, (something over \$16,000) payable one day after date. During the course of the dealings between them, the plaintiffs had furnished Samuel Ewart with goods and credit to the amount of over \$100,000. On the 12th July, 1832, David Ewart wrote to Mr. Boyce, on the subject of the embarrassed condition of Samuel Ewart, advising an assignment to him, for himself and the creditors in the state. In that letter, he proposed to take the assignment for the plaintiffs. In it he said, “most if not all, of the preferred creditors can be paid off in twelve months.” In another part of this letter, he said, “it is of vast importance this matter should be kept a most profound secret.” The assignment was accordingly taken, by David Ewart, or at least it is in his hand writing. It was, 1st, for the payment of the debt of the plaintiffs; 2nd, a debt to the bank, in which D. & J. Ewart were endorsers: 3rd, a debt to Barrett, in which D. & J. Ewart were sureties, and 4th, a debt to David Ewart. The property assigned was amply sufficient for the payment of the debts preferred. It remained in the possession of Samuel Ewart until the 7th of June, 1833, at which time the goods and property were sold, under a subsequent assignment for other creditors, and soon afterwards Samuel Ewart removed. Proceedings were instituted in equity, by the plaintiffs, against Samuel Ewart and his assigns, for the recovery of the proceeds of the said sale, under the assignment to them. This failed, upon the ground that the subsequent possession by Samuel Ewart rendered the assignment to them fraudulent and void, and the whole of the estate of Samuel Ewart was applied to the payment of his other creditors. Six grounds of defence were taken for the defendants, viz: 1. That the letter of the defendants was not a continuing guaranty. 2. That no notice of the accep-

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tance of the guaranty had been given to the defendants. 3. That no notice of the different advances or delivery of the goods to Samuel Ewart had been given. 4. That the plaintiff had given indulgence to Samuel Ewart, and therefore that the defendants were discharged. 5. That the plaintiffs' right of action was barred by the statute of limitations. 6. That the assignment to the plaintiffs was payment of the plaintiffs' debt. I instructed the jury, 1st, that the letter of the defendants was a continuing guaranty. I said to them, that like all other matters of contract, the sense and meaning of the parties, upon a fair construction of the words used must govern. Looking to the letter before us, it was manifest that D. & J. Ewart contemplated aid and indulgence to be afforded and extended to their brother by the plaintiffs, throughout the whole course of his business, subsequently to be carried on. There was nothing which shewed that it was to be confined to the commencement, or limited to a single advance. It was in this respect distinguishable from the case of Sollee and Warley v. Meugy. 1. Bail. 620. There the defendant's name was to be used only for "the amount of from \$1000 to \$1500." The case before us was more like that of Douglass and others v. Reynolds and others, 3. Pet. 113, in which the letter was in the following words: "Our friend, C. H. *to assist him in business, may require your aid from time to time*, either by acceptance or indorsement of his paper, or advances in cash. In order to save you *from harm* in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8000, should C. H. fail to do so." The whole court was of opinion that that letter was not a limited, but continuing guaranty; and so I thought this must be regarded. 2. I instructed the jury that notice of acceptance of the guaranty, was necessary to be shewn, in order to charge the defendants. This was however a question of fact, and they might decide it by presumptive as well as positive evidence. That the facts relied upon to make it out were the proximity of the defendants place of business to that in which S. Ewart carried on his: the relationship between them: their general acquaintance with his business: David Ewart's letter of the 12th of July, 1832, and the assignment of the 20th July to the

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plaintiffs, written by David Ewart. I told the jury, that in passing upon these facts, they ought to remember that the burthen was on the plaintiffs to prove the fact of notice, and if they were not perfectly satisfied from the facts referred to, that the defendants knew of the acceptance of the guaranty by the plaintiffs, they ought to find for the defendants. But if they knew it, then their knowledge would stand in place of "explicit notice." 3. I instructed the jury that in the case of a continuing guaranty, notice of advances was not necessary to be given. The case of *Douglass and others v. Reynolds and others*, 7 Pet. 113, is a direct authority in support of the instruction given. 4. I instructed the jury, that if indulgence be given by a valid contract to the principal, so as to alter the terms of the original contract, the sureties would be discharged. The note here did not discharge the original indebtedness by account, but still the plaintiffs, after its acceptance, could not have sued upon the account until the note was due. I thought, however, that this did not alter or affect the defendants' liability. It was wholly contingent, and had not then arisen. They had stipulated to be liable for \$4000, in the event of the "failure or delinquency of Samuel Ewart:" his insolvency had not then taken place, and hence there was "no giving day" to him beyond the time at which they were to be liable. 5. I instructed the jury, that the statute of limitations could not protect the defendants. I said to the jury, that on an ordinary continuing guaranty, I thought the statute would run from its acceptance. But, in the case before us, the plaintiffs had no cause of action against the defendants, according to the terms of the guaranty, until the insolvency of Samuel Ewart, which took place within four years before action brought. 6. I instructed the jury, that the assignment to the plaintiffs would be payment of their debt, or at least it would have the effect to discharge the defendants, unless the defendants had consented to the fact of its secrecy, and the retention of possession by Samuel Ewart. I told the jury, that I thought the letter of David Ewart, of the 12th of July, advising the assignment, and the giving of day for twelve months, and that this matter should be kept a "most profound secret," was proof enough to establish consent on the part

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of the defendants, to the concealment of the assignment and the retention of the possession by Samuel Ewart."

The jury found for the plaintiffs. The defendants now moved this court for a new trial, on the following grounds: 1. Because, his honor, the presiding judge, erred in charging the jury as law, that the paper sued on was a continuing guaranty. 2. Because, his honor erred in charging the jury as law, that as the paper was a continuing guaranty, no notice to the defendants, of advances made by the plaintiffs to Samuel Ewart, was necessary, previous to his insolvency in July, 1832. 3. Because, his honor erred in charging the jury as law, that the defendants were not exonerated from their liability, by reason of any time or indulgence given by plaintiffs to Samuel Ewart, without the consent of defendants. 4. Because, his honor erred in charging the jury as law, that the plaintiffs were not barred by the statute of limitations. 5. Because, his honor erred in charging the jury as law, that the assignment and delivery by Samuel Ewart, of his goods and effects, to the plaintiffs, in payment and satisfaction of their debt against him, formed no bar to their recovery in this case, and constituted no defence to this action. 6. Because, no notice to defendants of plaintiffs' acceptance of the guaranty was proved, and therefore the verdict of the jury was without sufficient evidence in the case, and contrary to the evidence in this particular. 7. Because, reasonable notice of non-payment by Samuel Ewart was not given to defendants.

CURIA, per GANTT, J. The action in this case is founded upon a letter of guaranty of the defendants to the plaintiffs, in the following words:

" *Charleston*, 12th October, 1825.

" Messrs. Boyce & Henry:

" Gentlemen,—Our brother, Samuel Ewart, is about to commence business on his own account, in Columbia. To assist him in which, he will stand in need of *your aid and indulgence*, which if you render him, (*in case of his failure or delinquency*,) *we will indemnify you to the amount of four thousand dollars*; and you will greatly oblige, gentlemen, yours, &c.

" D. & J. EWART."

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The presiding judge reports that Samuel Ewart, under this letter, commenced and carried on business in Columbia, until the month of June, 1833. That on the 6th of January, 1832, the plaintiffs closed their account current with Samuel Ewart, and took his note for the balance, amounting to something more than \$16,000, payable one day after date. And that during the course of the dealings between them, the plaintiffs had furnished Samuel Ewart with goods and credit to an amount exceeding \$100,000. At the trial of the cause, the counsel for the defendants took the following grounds of defence, viz: 1st, that the letter of the defendants was not a continuing guaranty: 2d, that no notice of the acceptance of the guaranty had been given to the defendants: 3d, that no notice of the different advances or delivery of the goods to Samuel Ewart, had been given: 4th, that the plaintiffs had given indulgence to Samuel Ewart, and therefore that the defendants were discharged: 5th, that the plaintiffs' right of action was barred by the statute of limitations: 6th, that the assignment to the plaintiffs was payment of their debt.

In the opinion about to be delivered, it will be seen that my attention has been particularly drawn to the 1st and 5th grounds; and the view which I have taken of them, will supersede the necessity of saying much, if any thing, on the rest.

The presiding judge, in the charge made to the jury, stated, that in giving construction to matters of contract, "the sense and meaning of the parties must govern:" and then, in the application of the rule, he went on further to say, "that the letter of the defendants was a continuing guaranty; and that looking to that letter, it was manifest that D. & J. Ewart contemplated aid and indulgence to be afforded and extended to their brother, by the plaintiffs, throughout the whole course of his business, subsequently to be carried on, and that there was nothing which showed that it was to be confined to the commencement, or limited to a single advance." The jury found a verdict in favor of the plaintiffs. The letter of the defendants I have examined with care, and from the rule above referred to, in relation to contracts, and especially commercial ones, I cannot give so extended a construction to the letter of the defendants, nor do I think that it will

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authorise any other fair conclusion than that it was designed to be strictly limited, and not a continuing guaranty. A philological analysis of the letter, will show this to have been the intention of the defendants. The words 'which,' twice used in the second sentence of the letter, both refer directly and immediately to the substance of what is contained in the previous sentence, as their antecedent ; so that without doing violence to the sense, the letter can only mean, that S. Ewart would require the aid and indulgence of the plaintiffs, in commencing business on his own account as a merchant, and that if Boyce & Henry would afford such aid and indulgence, (evidently meaning in the commencement of his business,) then in case of the failure or delinquency of Samuel Ewart, or in other words, in the event of his not paying them at the time agreed on, they, the defendants, would do so, to the amount of \$4000. The language, therefore, of the defendants points to a single transaction, such an one as would enable Samuel Ewart to set out as a merchant, by the aid of the plaintiffs, and cannot, by any fair or just construction, be so far extended, as to embrace transactions not mentioned, referred to, or implied, in the terms of the letter. { If, in this negotiation, the word 'commence' had not been used, but the reference had been generally to the business of a merchant, in which Samuel Ewart was about to engage, and the responsibility of the defendants made to attach to subsequent dealings, by the words used ; in such case, the construction of the instrument must have been according to the intention they expressed. } But, in the case before us, to extend the construction beyond the particular act of dealing, so obviously pointed out in the letter of the defendants, would violate the rule which governs, and ought in reason to govern in all cases of the kind, that a fair and reasonable interpretation, according to the true import of the terms, should be put upon the instrument. The design of the defendants was to introduce Samuel Ewart in business, and nothing more ; nor is there any thing in the letter which would imply an intention of incurring responsibility after such commencement, for any subsequent transaction between the parties. The guaranty of the defendants, in this case, being a limited and not a continuing one, it follows that the plaintiffs met

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with no 'failure or delinquency' on the part of Samuel Ewart, so as to charge the defendants, in the sense and spirit of their undertaking, with a responsibility to pay the amount of \$4000, depending on the contingency of failure or delinquency. But, these views depend not upon my own opinion merely, but have their foundation in sound reason, recognized by judicial decisions. The first case to which I shall refer, is that of Sollee & Warley v. John B. Meugy, reported in 1 Bail., 620, and tried at Kershaw, Spring term, 1830. That was an action of assumpsit, and the question made arose out of the special count in the declaration, in support of which, the plaintiffs offered in evidence the following letter: "Camden, 5th November, 1824. Mr. F. W. Sollee, Charleston. Sir,—Mr. John B. Matthieu, wishing to alter his present mode of doing business, and make arrangements in Charleston, has requested of me to continue my assistance by lending him my name. I have therefore consented that he shall use it for the amount of from 1000 to 1,500 dollars. He will, in future, carry on business on his own account, and make his own remittances. Yours, J. B. Meugy."—In this case, the presiding judge thought the guaranty a continuing one, and the plaintiffs recovered a verdict for the full amount of their claim, with interest. A motion was made to set aside the verdict, and for a new trial, on the ground of misdirection by the presiding judge. Judge O'Neill, who delivered the opinion of the court of appeals, says: "Is the guaranty a continued one, or is it limited to the amount of \$1500? And did the payment of this sum by Matthieu, in the course of his subsequent dealings, discharge the defendant?" In the course of his further remarks, he observed "that so soon as a debt to that amount was contracted, he was liable that far; but beyond it, he was not liable: when that debt was paid, he was discharged." The difference between the case last mentioned and that now before us, is certainly not calculated to lead to the conclusion that the former was more limited in its terms than the latter. Matthieu was already engaged in business as a merchant, connected, it would seem, with some one else; but desirous of doing business on his own account, procured the letter of guaranty, and obtained credit thereon; and he having paid the amount specified in the

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letter, Meugy was held to be exempt from all further responsibility on account of the guaranty contained in it. In principle, on the question of responsibility, that case is stronger to show that the guaranty was a continuing one, than the present; for, there is no restriction in the letter of Meugy, to confine the construction to be put upon it to any particular dealing, the responsibility attached to all future dealings not exceeding 1000 or 1,500 dollars; and that amount having been paid by the person obtaining the letter of guaranty, absolved the guarantor from any liability under it. Where the reason is the same, the law is so also; hence I conclude, that so soon as Samuel Ewart, for any dealings had with Boyce and Henry, under the letter of guaranty from the defendants, paid to the amount of \$4000, D. & J. Ewart were likewise absolved from all future responsibility.

The case of Douglass and others v. Reynolds and others, reported in 7 Peters. 113, was referred to by the presiding judge who tried this cause, as bearing a stronger resemblance to it than the case of Meugy. The case in 7 Peters. was assumpsit, on the following letter of guaranty: "Messrs. Reynolds, Byrne & Co.—Gentlemen, Our friend, Mr. Chester Haring, to assist him in business, may require your aid *from time to time*, either by acceptance or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you *at any time*, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so. Your obedient servants, John S. Douglass, Thos. G. Singleton, Hemans Going."—Mr. Justice Story, in delivering the opinion of the court in that case, as to the nature of the guaranty, pronounced it a continuing one. Would the terms of that letter admit of any other construction, as respects the guaranty contained in it? The opinion of the court was declared to be founded upon the language and apparent intent and object of the letter. The nature of the aid asked for in the case referred to, shows that Haring was then engaged in business: the aid was to be from *time to time*, and the defendants obliged them to be responsible *at any time*, for the sum expressed in the letter. Are there any such expressions in the letter of the Ewarts to the

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plaintiffs? So far from it, the words used are so specific as to confine the guaranty to an individual act of dealing; and the aid asked for is expressly stated to be, to assist Samuel Ewart in commencing business. It is not that Samuel Ewart may receive aid of the plaintiffs from time to time, and that they (the defendants) will be responsible, *at any time*, as in the last case referred to; but so guardedly precise, as to a particular object and transaction. The terms of this letter, therefore, virtually declare the law by which it shall be expounded; and I recur to the well established rule, that in giving construction to an instrument of this kind, it should be founded upon the language and the apparent intent and object of the instrument. I think the cases quoted sufficient to show, that the interpretation which I have given to the letter of defendants, and which, I cannot doubt, is a correct one, entitles them to exoneration from the verdict which has been rendered, under a mistaken view of the law by which this case should have been decided. A case quoted, however, from 3 Barn. and Ald. 595, bears so directly upon the question of guaranty, that I will strengthen the opinion I have given, by referring to it. Melville and another brought an action of assumpsit against Hayden, on a guaranty, which was in the following words: "I engage to guarantee the payment of Mr. Amos Moulden, to the extent of £60, at quarterly account bill, two months, for goods to be purchased by him, of Wm. and David Melville." It appeared that there had been a delivery of goods for three quarterly accounts, all of which had been satisfied by Moulden. The default was made by him in the fourth quarterly payment, for which the action was brought. It appeared that goods in the first quarter, to the amount of £59 4s. had been furnished; and in the second and third, to a greater amount. Abbott, chief justice, thought at the trial that the guaranty was at an end before the goods were furnished, for which the action was brought, and directed a nonsuit. A rule *nisi* was moved for. The chief justice again expressed himself as follows: "I had no doubt, at the trial, that this was not a continuing guaranty, and that it was applicable only to the first quarterly payment after it was given, and I am still of the same opinion." Baily, Holroyd and Best, Justices, concurred: and

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Baily, Justice, says—"a party who takes a guaranty of this sort, should carefully provide that there are words in it expressive of its being a guaranty for goods to be furnished by him from time to time." I will not pursue the analogy between that case and the one on which the court have decided; it is too strikingly in point to escape observation.

I am equally convinced on the 4th ground, as taken by the counsel for the defendants, that the plaintiffs are barred from a recovery by the statute of limitations. Waiving all that might be said, on several other grounds taken in this appeal, the statute will certainly operate from the 6th January, 1832, when the plaintiffs closed their account current with Samuel Ewart, and took his note for the balance due, say \$16,000, payable one day after date. The liability on the guaranty cannot be considered more efficacious than that created by the note. Four years from that period, the bar was complete; and the suit not having been instituted within four years from the closing of the dealings between plaintiffs and S. Ewart, they are prevented, by lapse of time, from a recovery, if the circumstances of the case would otherwise have admitted of it. In this case, I would not have it understood, that because I have confined my observations principally to two grounds taken in the brief, that therefore I have thought no other ground taken would have availed the defendants. On the contrary, I feel inclined to think, that the plaintiffs having omitted to give the defendants express notice of their acceptance of the guaranty, would have precluded them from establishing it as such; neither do I think the circumstances commented upon by the judge, as affording presumptive evidence, of notice sufficient of themselves to supersede the necessity of express notice. Besides this, the case was attended with circumstances sufficient, in my opinion, to have rebutted the presumption arising from the proximity of the defendants' place of business to that in which S. Ewart carried on his, together with the other circumstances enumerated in the charge. The date of the letter of the defendants, say in 1825, and the great lapse of time which intervened between the 25th January, 1825, and the closing of accounts between plaintiffs and S. Ewart; the very extended credit given to

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S. Ewart, by the plaintiffs, far exceeds the amount of the supposed guaranty; the settlement of that account, and the note taken to secure the amount embraced in it, added to the neglect of the plaintiffs in not calling on the defendants for the amount, if, indeed, the plaintiffs ever relied on this as an existing guaranty, would neutralize the supposed force of the circumstances respecting notice of the plaintiffs' acceptance of the guaranty. Much, too, might be said on the question of the assignment from S. Ewart to plaintiffs; but as it is an unnecessary link in the solution of this question, I forbear, from a principle of delicacy, to comment upon it.—It was stated by the plaintiffs' counsel that if, in the opinion of the court, the law of the case was against the plaintiffs, a nonsuit might be awarded; and that being the result, as considered by a majority of the court, the nonsuit, as asked for, is ordered.

RICHARDSON, BUTLER, and EARLE, Justices, concurred; BUTLER, J. resting his judgment, mainly, on the statute of limitations.

O'NEALL, J. dissenting. As I understand my brethren, they differ with me on two questions: 1st, whether the guaranty be a continuing one, and 2d, whether the plaintiffs' action be barred.

My circuit opinion, on each of these questions, has undergone no change. The able argument of the defendants' counsel has received a very deliberate consideration, and yet I think there is nothing in it which shakes the view I take of this case. There is no artificial rule in these cases of guaranty which forces us to construe the instrument against either party. "The sense and meaning of the parties, upon a fair construction of the words used, must govern." Still, there are rules of construction which may aid us in arriving at this. What is the most usual mode of interpreting words used? It is, it seems to me, to give them that meaning which is their most usual and familiar interpretation: if they are susceptible of two meanings, and one of them be favorable to, and the other against the party using them, and there is nothing which gives preponderance to one meaning over the other, then comes in the rule that they must be understood, in that sense which is least favorable to the party using the words. In

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construing an instrument, construction should be given to the whole of it, and not to words or parts of sentences, by themselves. Garbling an instrument, and construing it by words detached from the context, is any thing else than arriving at the sense and meaning of the parties. With these rules as our guide, let us attempt the construction of the defendants' letter. Take the whole and read it as such, and, I repeat here what I said in my report, "it is manifest to my mind, (although I presume it is not so to that of others,) that D. & J. Ewart contemplated aid and indulgence to be extended to their brother throughout the whole course of his business." For, to a merchant, embarking in business in this town to buy cotton and sell goods, what advantage could it have afforded to have had credit for \$4000 given him, for even a year? It would have been but a drop in the bucket, which would have remained, in spite of it, empty and dry. But it might well be, that, to gentlemen of the capital and enterprise of the plaintiffs, the certainty of an eventual indemnity of \$4000, against loss, might present a motive to hazard a much larger amount in favoring the brother of their correspondents. This would be certainly the effect which such a letter would have on most minds; and from such an effect, great advantages might be expected to be realized. Look to the account current between Boyce & Henry and Samuel Ewart, amounting to upwards of \$170,000, and ask, how can it be believed that the guaranty of \$4000 was intended to cover merely the first dealings amounting to that sum? If this had been the true construction, the guaranty was exhausted on the 29th November ensuing its date: and if the plaintiffs had then said to Samuel Ewart, "your credit is exhausted—we can credit you no farther," the aid and indulgence procured for him would have been hardly worth the paper which the defendants used in writing their letter. The other construction, that it was to run through, and be a security against his failure for that much, in all his business, makes the guaranty worth something to Samuel Ewart: for then, it is the cause of credit, running through several years, and of aid to the amount of at least \$170,000. Let us now read this letter—remembering that it is between merchant and merchant: "Our brother, Samuel Ewart, is about to commence

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business on his own account in Columbia, *in which* he will stand in need of *your aid and indulgence*, which if you render him, (in case of his *failure or delinquency*,) *we will indemnify you to the amount of four thousand dollars.*" What is meant by the words 'is about to commence business on his own account, in *which*,' &c.? To what does the word 'which' refer? Is it to the commencement of his business, or is it to the business itself? The grammatical construction of the sentence shows that 'business' is the antecedent of the relative pronoun 'which'; and it should read, putting in the word to which the relative refers, 'Our brother, Samuel Ewart, is about to commence business on his own account, in which business he will stand in need,' &c. This reading is not only grammatical, but it is so consistent with the object of the writer and the subsequent words used, that I am surprised any other construction should ever have been thought of. Can it be supposed, that a writer of Mr. David Ewart's intelligence would have spoken of a future necessity, when, if the word used related to the commencement of business, it was then present and existing? The writer goes on to say, 'he will stand in need of your aid and indulgence.' These words contemplate, if I understand the English language, future aid and future indulgence. The one was to be rendered as the party needed it, and the other to be extended to him from time to time. The natural import of the terms is, 'he will want money and goods from you in the course of his business, and he may not be able to pay for them regularly, and therefore he will need your aid and indulgence; which if you render him, (in case of his *failure or delinquency*,) we will indemnify you.' If the letter had stopped at these words, and 'to the amount of \$4000' had not been added, could it have been doubted that the guaranty was both continuing and unlimited? I think not. If so, before we recur to the words used, let us ask what effect the sum fixed can have? It cannot prevent the guaranty from being regarded as a continuing one: it is nothing more than the limitation of the defendants' eventual liability under it. What is meant by the terms '*failure or delinquency*?' It is true, in legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency; but, as I said in

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the outset, the defendants were merchants speaking to merchants; and their words must have their usual interpretation among them. The word 'failure,' applied to a merchant or mercantile concern, means an inability to pay his or their debts, from insolvency.—I take it, then, that the word 'failure' must be regarded as synonymous with 'insolvency.' 'Delinquency' cannot mean, when applied to a merchant, any thing less than that he has proved to be dishonest, and attempted to evade the payment of his debts. Read this part of the letter, 'in case of his insolvency or refusal to pay, we will indemnify you.' Let it now be asked what is meant by the words 'we will indemnify you.' Can it be supposed that they were intended to make the defendants mere sureties for \$4000, then to be advanced? Indemnity is a provision against a future possible loss. That is what the parties here contemplated. Samuel Ewart might fail in his business; and if so, D. & J. Ewart would indemnify the plaintiffs for a part of their loss, to the amount of \$4000.

Having thus run through the letter, and ascertained the meaning of every doubtful phrase, without resorting to the rule, that if the words be doubtful, and there is nothing to fix a contrary meaning—then, that they should be taken in the sense least favorable to the party using them, the construction will be much strengthened by thus applying it, and removing every doubt.—Let the letter be now read as I have construed it: 'Our brother, Samuel Ewart, is about to commence business on his own account, in Columbia, in which business he will need your aid and indulgence, which if you render him, (in case of his insolvency or refusal to pay his debts,) we will indemnify you to the amount of \$4000,'—and I will ask any unprejudiced man what sort of guaranty is it? Is it not to be and exist during Samuel Ewart's business? The answer must be, *it is so*: and thus it becomes a continuing guaranty, limited as to the amount to be paid under it. Is there any thing in the cases on this subject which forbids this conclusion? My time will not allow me to examine them at length and in detail, as I should desire to do; but I know there is nothing in any one of them which stands in the way. None of them afford any such test, (as my friend, the last counsel for the

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defendant supposed,) by which every case of this sort may be at once decided, and the court enabled to say what is a continuing guaranty, and what is not one. Each case depends upon itself; *the contract between the parties is its law*, and not an artificial rule. If there is any such rule applicable to every case, it is that stated by Lord Ellenborough, when he said, "if a party mean to confine his liability to a single dealing, he must take care to say so."

The cases of *Mason v. Pritchard*, 12 E. 227; *Merle v. Wells*, 2 Camp. 413; *Bastow v. Bennett*, 3 Camp. 220; *Hargreave v. Smee*, 6 Bing. 284; *Simpson v. Manley*, 2 Tyr. 86; *Allen v. Fleming*, 9 Bing. 618, are all cases of continuing guaranty. That they are opposed by *Melville v. Hayden*, 3 Barn. & Ald. 593; *Kay v. Groves*, 6 Bing. 276, and *Nicholson v. Paget*, 1 Cr. & Mee. 54; in which it was held that the guaranties were special and limited, is not to be wondered at, when the result of the cases depended on the words used by the parties. The case of *Sollee & Warley v. Meugy*, 1 Bail. 620, is also a case of limited guaranty on the words used. But if I have succeeded, as I hope I have shown, that the parties guaranteeing here looked forward to successive dealings and future credits, then that case does not touch this. I said in my report, that this case was more like *Douglass v. Reynolds*, 7 Pet. 113, than the case of *Sollee & Warley v. Meugy*; and I now say, that, take that case and compare it with this, and they seem to me to be identical in every thing except that in that, the words 'from *time to time*,' and 'at *any time*,' occur; and in this, they are wanting: but in this, other words are used, indicating as clearly that the parties contemplated future dealings, credit and responsibility. It will be seen, that in passing upon the construction of the guaranty there, great stress is laid upon the fact that the object was to assist Haring in business. It is said "it was not contemplated to be a single transaction, or an unbroken series of transactions, for a limited period." These words apply in full force in this case, as much as they do to that. In that case, Mr. Justice Story denied that the courts have inclined to vary the rule of construction of instruments of this nature, and to hold them to be *strictissimi juris*, as to their interpretation. In his opinion, he sets out and maintains every rule of construc-

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tion on which I have relied. It seems to me, that all the confusion, in cases like the present, has arisen from the importance attached to the limitation in amount. It is hence that a guaranty is often concluded to be a limited one throughout, when it was only intended to guard against a too great eventual responsibility. I can very well understand, when a party says "for goods to be delivered, or money to be advanced, to the amount of \$4000, I will be responsible," that this should be held to be a limited guaranty: but when those expressions are varied, and the party says—"for goods to be delivered, or money to be advanced, I will indemnify you to the amount of \$4000,"—I am, I confess, unable to see the reason why that should be confined to a single transaction, or to an unbroken series of transactions, amounting to \$4000. It is satisfied in every word, by an eventual loss arising out of the dealings between the parties. If the natural import of the words leads to this result, why apply an artificial rule to break down their meaning, and make the guaranty mean something which the parties did not intend? I do not understand that there is, on a contract, any such rule, as that the surety is to be favored in its construction. He is a party to it, and the rules of construction apply to him as they would to any other party. Because a case is a hard one, is no reason that a party should be excused: but when we talk about a hard case, we forget that to absolve one, on whom a contract operates hardly, may make the case an equally hard one on the other party, who is thus deprived of his money. I am *thoroughly satisfied*, that the contract sued on is a continuing guaranty, limited in amount, but not as to time.

This being so, I propose now to show that the statute of limitations is no bar. To be barred, it must appear that the plaintiffs' cause of action accrued four years before the commencement of this suit. When could they sue the defendants on this guaranty? Certainly not until the insolvency of Samuel Ewart, or his refusal to pay his debts. If the suit could only be brought at or after his insolvency, it is perfectly clear, that from the assignment, which was the first evidence of his insolvency, to the commencement of this suit, the four years had not run out. If from a refusal to pay his debts, it would still be a less time: for, during a year

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succeeding the assignment, he was endeavoring to pay. But, if the words 'failure or delinquency' mean simply a refusal to pay the debt to the plaintiffs, still the action is not barred; for, he attempted to pay by the assignment, and in the course of the year succeeding it, made payments. If, however, the words 'failure or delinquency' mean a neglect to pay, then, I admit, something beyond them must be shown to prevent the operation of the statute. That, I think, is done, when it is shown that by the concurrence of the defendants an assignment was made to the plaintiffs, which was defeated by the course they recommended to be pursued in relation to it. If the guaranty be a continuing one, then that act, done with their concurrence, was an admission of their liability, and the statute could not sooner begin to run.—But, when it is remembered, that by the advice of David Ewart, Samuel Ewart was to go on with his business for another year, in order to discharge this very debt, and other debts, to the defendants, or for which they were liable, and that the plaintiffs also consented to this arrangement, I should say that the plaintiffs could not sue these defendants, until the expiration of that time, and are therefore not barred.

EVANS, J., concurred, as to the construction of the guaranty.

Gregg, for the motion.

NOTE.—It will be observed, that in reporting the cases of the Columbia December Term of the Court of Appeals, none of the arguments of counsel have been given. It would be perhaps sufficient here to remark, on that subject, that the present incumbent was not elected to the office of Reporter until the 14th of December, 1838, when all the cases of that term had been argued, and the opinions of the court, in all but two or three of them, delivered. The only mode in which any thing like a correct statement of the arguments of counsel in these cases could have been obtained, (if they could have been procured at all,) would have been through the politeness of the gentlemen of the bar, concerned in them, who might have retained, or would have been willing to prepare an abstract of their arguments, in the respective cases. To have waited for such information, would have involved too great delay in the publication of the decisions; which, under the present law, are required to be published within such a period of time from their delivery, as to leave nothing to spare. The only

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case in which any abstract of the argument of counsel has been furnished to the reporter, in relation to the preceding cases, is that of Mr. Gregg, in the case of Boyce & Henry v. D. & J. Ewart. The politeness of Mr. Gregg put in the possession of the reporter a full statement of his very able argument in that case: and it is with sincere regret that the reporter found it impossible to publish it, where it properly belongs, in the report of the case itself. It will be remarked, that the case itself, embracing the very elaborate opinion of the majority of the court, and the dissenting opinions of Justices O'Neill and Evans, makes in all nearly twenty pages; which is as much space, judging from the materials to make up the volume of Reports, as could well be assigned to it. The argument of Mr. Gregg, if published entire, would have added at least twenty pages more to the case; and the reporter found it impossible to do justice to it by any abridgment of it, which he thought practicable. The reporter regrets his inability to give the argument of Mr. Gregg, in the case referred to; not only because he feels confident that it would have been read with great satisfaction, but because Mr. Gregg, in furnishing the reporter with a statement of his argument, drawn up by himself, has pursued the only mode in which the arguments of counsel ever can be given by the reporter, which will render them really valuable, and creditable to the profession. R.

CASES AT LAW,
ARGUED AND DETERMINED IN
THE COURT OF APPEALS
OF
SOUTH-CAROLINA,
AT
CHARLESTON, FEBRUARY, 1839.

JUDGES PRESENT:

HON. RICHARD GANTT,
 HON. JOHN S. RICHARDSON,
 HON. JOHN B. O'NEALL,
 HON. JOSIAH J. EVANS,
 HON. BAYLIS J. EARLE,
 HON. A. P. BUTLER.

THE STATE v. LUDER E. BOHLES.

Upon an indictment against the defendant, the proprietor of a licensed grocery No. 3, in the City of Charleston, for selling liquor to a slave—the proof was, that the liquor was sold by the clerk of the defendant, in his absence: and as far as it appeared by any *express* evidence, without his authority. The jury found the defendant guilty. Under the peculiar circumstances of the case—the clerk having been already punished for the same act—the court granted a new trial.

THIS case came up on an appeal from the City Court of Charleston. The report of his honor, the Recorder, is as follows: “This was an indictment against defendant, for selling liquor to a slave. Henry Carminade sworn—testified that on the night of the 8th of October last, he saw two negroes sitting in defendant’s store: Ann, belonging to Mrs. Dupree, was going in at the time:

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stopped to see what she was going for : saw her take a phial out of her apron, and saw the clerk of the defendant pour liquor into the bottle, and she paid for it. Witness then went in and took the bottle, and asked the clerk if he had a written permission to sell to this negro : denied that he had sold. The store of the defendant is at the corner of Archdale-street and Swinton's lane. It is a license No. 3 grocery store : Schroeder is the name of the clerk : he has been clerk in this store at least six months previous to the selling. On his cross-examination, he said defendant was not present, but came in immediately afterwards. It was about 8 o'clock at night.—This was all the evidence. I charged the jury, that as the defendant was not present, he could not be convicted, unless they came to the conclusion that the selling was with his permission and sanction ; and of this they must be satisfied from the evidence before them. The jury found the defendant guilty." The defendant now moves for a new trial, on the ground, " That the verdict was manifestly against the evidence, as it was distinctly proved by the State that the defendant was not present when the liquor was sold to the slave, and that he knew nothing of the transaction."

CURIA, per RICHARDSON, J. The motion for a re-hearing before the jury in this case, is addressed to the judicial discretion of the law : and such discretionary authority should be exercised only upon a just and rational consideration of the facts. The evidence that the clerk sold the gin to the negro slave without the permit of her owner was full, and he was properly convicted ; and the same facts may raise a presumption that the clerk was authorised by the master of the shop, so as to implicate him in the act of selling the liquor ; yet we must allow, on the part of the present defendant, the consideration due to the principle of law—that one man is not amenable, *criminally*, for the acts of another, unless he has sanctioned them in some way. And when we reflect that the selling by the clerk was a phial of gin only—probably for two or three cents—that he denied selling at all, and may have taken upon himself so trifling a liberty ; that the owner of the shop was himself absent at the time, and has been in no

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way otherwise implicable in such illicit trading ; that every charge of the kind against a shopkeeper supposes a dishonest practice of trafficking with slaves, which is highly disreputable ; a majority of the court think that, in a case of such circumstances, and where the clerk has been already punished, a due regard for the legal principle before laid down, well warrants that the present defendant should have another opportunity of showing his own innocence.—A new trial is therefore granted.

GANTT, O'NEALL, EVANS, and BUTLER, Justices, concurred.

Phillips, for the motion.

The *Attorney General*, contra.

THE STATE v. THOMAS STONE.

The rule of evidence, established by the 5th section of the act of 1834, p. 14, in relation to illegal traffic with slaves, applies only, it seems, to cases arising under the act of 1817.

Though the act of 1834, *as to vendors* of liquors, &c. may be considered as repealing the penal provisions of the act of 1817 ; yet the rule of evidence established by the act of 1817, (which requires the defendant to produce and prove the written permission of the owner or employer, to deal, trade or traffic,) remains in full force, and applies to indictments under the act of 1834.

Where a man is charged with a crime and does not deny it, a jury is warranted, (especially in connection with other strong circumstances,) in finding a verdict of guilty.

Before O'NEALL, J., at Beaufort, Spring Term, 1838.

THE report of his honor, the presiding judge, is as follows :—
“ The defendant was indicted under the act of 1834, as a vendor

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of spirituous liquors, in four counts ; 1st, for selling ; 2d, exchanging ; 3d, giving ; and 4th, delivering spirits to a slave. The proof was, that the defendant was the owner of a store in Grahamville, in which he sold spirits. To the inclosure, in which was situated the store of the defendant, the house of a lady, and a tailor's shop, there was a small back gate. The defendant being suspected of trading with negroes, a negro man named Charles, belonging to Captain. Huguenin, was furnished with twenty-five cents and a bottle, and directed to go to the store of the defendant and buy some spirits. He was accompanied by Mr. Huguenin and Mr. Dupont: the latter saw him enter the inclosure at the small gate spoken of: he returned in a short time, with a pint of rum in the bottle, and the change : Messrs. Huguenin and Dupont then went to the defendant's store, and met him at the door : Mr. Huguenin, holding the bottle in his hand, said " here is a bottle of spirits which you sold to my father's man." The defendant replied " I did not sell the bottle." Huguenin said " no : but you sold the liquor." To this defendant said nothing : Huguenin then told him, he had a day or two before sold his house-servant some spirits: the defendant said he did not know that the negro to whom he had previously sold the spirits, was his, (Mr. Huguenin's).—Mr. Stephens, a witness for the defendant, said that he and his co-partner occupied the tailor's shop, in the rear of the store : that he had been all the evening in the store : that negroes had been there : that he did not see Captain Huguenin's man, Charles, there : that no spirits had been sold that night: that he was present when Huguenin and Dupont came : that the defendant, when charged by Huguenin with selling spirits to Charles, *denied it*.—The jury were instructed, that the 5th section of the act of 1834, from its words, applied to cases under the act of 1817; and that therefore the rule of evidence established by it could not apply to this case. It is strange, however, that the defendant should except to a part of the charge, (as this manifestly was,) in his favor. I thought that, notwithstanding the act of 1834, as to vendors, was a repeal of the penal provisions of the act of 1817, that yet the rule of evidence established by that act, (which requires the defendant to produce and prove the written

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permission of the owner or employer, to deal, trade, or traffic,) remained in force, and applied to this case. I said to the jury, in the course of my observations on the evidence, that when a man was charged with a crime and did not deny it, we should be usually led to conclude that he was guilty; on the principle of the old adage, "silence gives consent."—The evidence was fairly summed up, and submitted to the jury, who very properly convicted the defendant."

The defendant now moves for a new trial on the following grounds: 1. That his honor, the presiding judge, charged, that the 5th section of the act of 1834, entitled "An act to amend the laws in relation to slaves and free persons of color," making the evidence of a negro being seen to go into a store without an article, and to come out with an article, sufficient to convict a defendant of trading, &c. *did not* apply to the offence for which the defendant was indicted in this case. 2. That his honor charged, that the clause in the act of 1817, as to the evidence of a ticket, &c. *did* apply to this case. 3. That his honor charged, that generally in law, when one is charged with having committed an offence, and he fails to deny it, the old saying of "silence gives consent," *would apply*. 4. That penal statutes are to be construed strictly, and that the act of 1834 makes it sufficient evidence to convict, that a slave be seen *entering* "a shop, store, or house," used for trading, without an article, and returning with it; but that the evidence in this case was only that the slave was seen entering a "yard," and the witnesses expressly testified, that they did not see him enter either shop, store, or house, yet his honor charged the jury that the evidence was sufficient, under that act, to convict the defendant. 5. That the verdict is contrary to law and the evidence.

CURIA, per ONHALL, J. In this case, we perceive no error in the legal instructions given to the jury. The facts well warranted the verdict.

The motion is dismissed.

GANTT, EVANS and BUTLER, Justices, concurred. RICHARDSON,

The State v. Michael O'Conner.

J. was absent 'from indisposition. EARLE, J. was absent at the argument, but concurred in the judgment.

M'Carthy, for the motion.

Solicitor Edwards, contra.

THE STATE v. MICHAEL O'CONNER.

Under our acts of 1721, (P. L. 116,) and 1785, (P. L. 379,) an execution issuing out of the Court of Common Pleas of any district, creates a lien upon the personal property of the defendant, *throughout the state*, from the time of its lodgment in the sheriff's office; and is not confined to property in the district in which the execution is lodged.—[S. P. Woodward v. Hill, 3 M'Cord. Rep. 241.]

Before O'NEALL, J., at Beaufort, Spring Term, 1838.

THIS was a motion for a new trial. The report of the case, by his honor, the presiding judge, is as follows: "The defendant was indicted for an assault committed on the person of a Mr. Barns, the deputy sheriff. The assault was fully proved: it was attempted to be justified on the ground that the defendant was in possession of some shingles, which the deputy was about unlawfully removing. The proof was, that five or six executions were in the hands of the sheriff's deputy, in the town of Beaufort, against one James Maloney, of Colleton district: his flat, loaded with shingles, and consigned to the defendant, came down; and while the shingles were unloading, the deputy told the defendant, if he had not paid for the shingles, not to do so. Subsequently, the deputy seized upon the shingles, and was about to remove them, when the defendant, with a club and brickbats, resisted him. The defendant in, striking distance, drew a club over the deputy to strike him. Maloney proved that the shingles were

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made in Colleton district: about a month before they were sent to Beaufort, they were sold and delivered to the defendant. The executions were lodged in the sheriff's office of Beaufort anterior to the alleged sale.—I instructed the jury, that an execution lodged in the sheriff's office of Beaufort, bound the defendant's goods in Colleton. This I think the necessary result of the acts of the general assembly. The first is the act of 1721, P. L. sec. 35, p. 116, by which it was provided, "that an execution on a judgment obtained in any court of the state, shall run and be directed into all the counties and precincts of the province, and be returnable into the same whence it was issued." The next act is that of 1785, commonly called the "county court act," (the last paragraph of the 37th section, P. L. 379,) by which it is provided, that "no writ of fieri facias or other execution, shall bind the property of the estate real and personal, against which such writ is sued forth; but from the time that such writ shall be delivered to the sheriff or other officer to be executed, and such sheriff or other officer shall, upon the receipt of such writ, indorse upon the back of the same the day of the month and year when he received the same; and if two or more such writs should be delivered against the same person, that which was first delivered shall be first satisfied." This last act has given rise to our doctrine of leins of executions, and it is plain from it that the execution binds from its lodgment, the property of the defendant, against which it is issued. The execution, according to the act of 1721, runs into all the districts of the state, and it is of course issued against the defendant's property in each and all of them."

The defendant now moves this court for a new trial, on the following ground: "Because, his honor charged the jury, that a fieri facias, lodged in the sheriff's office of Beaufort district, bound the property of the party against whom it was issued in all other districts, although not entered in the offices of those districts."

CURIA, per O'NEALL, J. This court concurs in the point of law ruled by the judge below. His judgment has the sanction of the case of *Woodward v. Hill*, 3 M'Cord. Rep. 241.

The motion is dismissed.

The State v. Cordes.

EVANS and BUTLER, Justices, concurred. RICHARDSON, J. absent from indisposition. EARLE, J. absent at the hearing, but concurred in the judgment.

E. & A. Rhett, for the motion.

Solicitor Edwards, contra.

THE STATE v. ALBERT CORDES.

Indictment under the act of 1836, (Acts, p. 60,) for harboring one F. C. Lenderman, a deserted seaman. By the shipping articles of the Bremen barque *Elizabeth*, Lenderman bound himself "to go in her as a seaman, from *Bremen* to *Baltimore*, and from *Baltimore* back again to *Bremen*, or any other place where our destiny may be, or the further voyages may go;" and that "he would not leave the ship out of the country (from home), nor demand his discharge, nor his wages that have not been received from a foreign tribunal." HELD, that by the articles, the vessel, after reaching her port of destination, might proceed to other ports before her return to Bremen; and that her coming from Baltimore to Charleston did not constitute such an unreasonable lengthening, either of the principal voyage contemplated, or its duration, as to render the contract void, or entitle the seamen to be discharged from the vessel.—The seaman, Lenderman, being still bound to the vessel, and the defendant having been found guilty of harboring him while he deserted from the ship, the court refused to grant a new trial; two juries having found the defendant guilty on the evidence.

THIS case came up on an appeal from the City Court. It was tried before his honor, the recorder, (Jacob Axson, Esq.) at April term, 1838. The report of the recorder is as follows: "This was an indictment against the defendant, under the act of 1836, for harboring an articulated seaman, F. C. Lenderman. This was a second trial of this case, and all the evidence reported to the court on the first trial was by consent, received in this. That testimony was in substance as follows: "Lewis Trappman,

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sworn—testified that the articles produced to him are the shipping articles of the Bremen barque Elizabeth: they were deposited as such with him in his official capacity as Consul of Bremen: they are certified as having been executed in Bremen: don't know the signatures: knows nothing of the paper, but that it came out with that ship, and was deposited in his office: knows the captain personally: don't know the sailors: the names of Lenderman and Stenkin are there. [Mr. Thompson objected to the receiving the articles in evidence, not having been sufficiently proved. I overruled the objection, and permitted the articles to go to the jury.] C. P. L. Westendorff, sworn—gave the following translation of the parts material to the case: 1st article—"to go from Bremen to Baltimore, and from Baltimore back again to this place, (Bremen) or any other place where our destiny may be, or the further voyages may go." Article 5th, part 1st,—the seamen bind themselves that "they will not leave the ship out of the country, (from home) nor demand our discharge nor our wages that have not been received from a foreign tribunal."—John Meyer, sworn—testified that on 29th March last, he was at the theatre: that Edward Wood, the constable, and the captain of the Elizabeth called on him, to assist in looking for his seamen: witness asked if they had a warrant: they said yes: they together went to Cordes' (defendant's) house in King-street: witness got upon the gate: staid there some time: heard different voices in the house: called to the captain, and told him he believed his seamen were there: came down and knocked at the door: some time before the door was open: the door was opened by Mrs. Cordes: believes it to be her: told her what they came for: she said they had no business there: he said he had a warrant for two sailors, naming them, to wit, Lenderman and Stenkin—the captain named them to Mrs. Cordes. Cordes, the defendant, came down stairs and asked what was the matter: told him they came to search for the seamen, naming them: he (Cordes) replied, if he had not heard two days previous that the warrant was out for them, they would have found them there, but he had taken damned good care that they should not get them: concluded to search, but they could not find them: the captain repeated the

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names of the seamen several times in the presence of Cordes.— On his cross-examination, was asked for the warrant under which he acted, which was produced. He said an action was brought against him for trespass for entering Cordes' house : he (witness) advised this prosecution against Cordes : did so that very night, before he heard of any action to be brought against him. He says Cordes keeps boarders, can't say they are sailors : have that appearance : Cordes is a baker by trade. Upon being asked if he knew any thing against defendant's character, he said that Mr. Smith, late attorney general, did not like him ; he prosecuted him for beating his goat. Witness did not ask Cordes if he had concealed these persons ; the captain did, to which Cordes made the reply above stated, that he had taken care they should not find them. Does not know that Lenderman or Stenkin belonged to the Elizabeth, or deserted from her ; knows nothing about them. He said Cordes was much irritated ; abused them very much, until he threatened to put him in the guard house if he did not desist. Witness himself was a little irritated at last. Defendant would not let them read the warrant to him. Cordes spoke alternately in English and Dutch ; he was not in a very violent passion when he said he had taken damned good care they should not find them. Cordes admitted that he had heard the seamen had run away. In reply, he said Cordes lives in King-street, in the corporate limits. Cordes spoke in Dutch when he first came down stairs. The captain mentioned the names of all the men three or four times : Cordes admitted that he had heard these men had run away.—Defence. Albert C. Curtis, sworn—testified he lives in Cordes' house : hires a shop in front, and boards with him : knows Lenderman : has seen him at Cordes' house. Lenderman was an acquaintance of Cordes' in the old country : were neighbors there : came to Cordes to bring accounts from his family : came always openly, never secretly : never knew of any seamen secreted in Cordes' house by day or by night. Recollects the night Meyer and the captain came to Cordes' : was present the greater part of the time they were there : did not hear Cordes admit that any seamen of the Elizabeth were harbored in his house. The constable asked Mr. Cordes if any sailors were in his house : he

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said not : has seen several seamen there, but does not know if they belonged to the Elizabeth : they came generally about 7 o'clock, and went away about 10 : they came to see him : they were countrymen : he heard that the seamen of the Elizabeth had run away : never saw Lenderman in the house after that.—On his cross-examination, he said he is a cousin of Cordes, resides there free of expense, but sometimes assists him in his business. Witness knew that Lenderman belonged to the Elizabeth : was not present when Cordes came down stairs : the conversation with Mrs. Cordes was in German : saw Lenderman at Cordes' four or five times : did not see him there the day the constable came there : it was four or five days before that : never saw Lenderman at Cordes' after he heard of his being a runaway, until the vessel was gone : saw him there frequently afterwards : never saw Lenderman there in the mornings, except on Sundays, and then he came at daylight : when he saw him there early in the morning, it was in the room of Cordes, down stairs, his wife being there with them : never saw Lenderman there after 10 o'clock at night : never heard Cordes say that he knew the seamen had deserted.—J. C. Blum, sworn—testified he knows defendant : has been dealing with him for five years : he is a baker : he is a very correct, honest man : a man of irreproachable character." In addition, F. C. Lenderman, the seaman said to have been harbored, was adduced on the part of the state. He proved his signature to the articles : on his cross-examination, said he had been at Cordes' house : was never there secretly : never was concealed by Cordes : never told Cordes he had run away from the vessel : never was concealed in any out-house or elsewhere. In reply, said can't say how often he was at Cordes' : many times when the vessel was at the wharf, before he ran away : knows nothing about the constable going there : heard when he came from the country, that there was a warrant against him : the very day he ran away, he went into the country : when the vessel was gone, came to town, and boarded at Cordes' : never went to Cordes' after he quit the vessel and before he went into the country : went into the country immediately : heard in a shop on the neck that the vessel was gone. In reply to a question put by Mr. Thomp-

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son, he said Cordes never encouraged him to quit the vessel, or concealed him in any way. Here the testimony closed. I charged the jury, that in order to convict the defendant, it must appear that Lenderman was an articed seaman; had deserted, and had been harbored by the defendant. I charged that the articles were the contract between the captain and the mariner: if violated by the mariner he was liable to be punished: if by the captain the mariner was absolved from all obligations under them. That coming to Charleston was not authorised by the terms of the articles, and could not be justified under the general terms, unless it was proved that it was rendered necessary by stress of weather, or other necessity, or that it was usual or indispensable to the stipulated voyage. My opinion was, and I so expressed it to the jury, that coming to Charleston was a violation of the articles, which entitled Lenderman to his discharge, and that the defendant was entitled to an acquittal. The jury found the defendant guilty, and he now moves this Court for a new trial on the following grounds. 1. Because it is submitted, his honor, the Recorder, correctly charged the jury, that Lenderman, the sailor alleged to have been harbored, was not legally bound by his articles to the barque Elizabeth, and consequently the legal offence charged in the indictment could not have been completed, and the verdict in this respect was against law. 2. Because independent of the fact that no contract was proved to exist, binding the seaman to the barque Elizabeth in Charleston, as an articed seaman at the time of the alleged harboring, there was no evidence to prove the harboring; but on the contrary, the witness for the prosecution (the man alleged to have been harbored) expressly swore he was neither harbored nor concealed by the defendant, and the defendant submits that the verdict in this respect was palpably against evidence. 3. Because it is submitted the verdict was against the settled law and the plain evidence in the case.

CURIA, per EVANS, J. I think it very clear the articles contemplated, that the vessel after reaching her port of destination might proceed to other ports before her return to Bremen, and there is nothing in the law regulating those contracts, which prohibits such

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agreements. Sailors are in general ignorant, and easily beguiled and defrauded; and hence, in order to prevent the impositions too often practised upon their ignorance and defenceless condition, the laws, both of England and the United States, have gone very far to relieve them from these contracts, where any unreasonable construction is attempted to be put on general terms used in the articles. If the captain of the *Elizabeth*, after reaching Baltimore, instead of returning to Bremen, had taken in a new freight for the South Sea Islands, for China, or Archangel, or any other distant port obviously not within the contemplation of the parties when the articles were signed, it would have been a breach of the contract by the captain, which would have discharged the sailors, and in such case Lenderman would not have been a deserter. But I apprehend the coming from Baltimore to Charleston, is not such an unreasonable lengthening either of the voyage itself or its duration, as will authorise this court to pronounce the contract void for this reason. As to the second ground, whether the testimony was sufficient to convict the defendant of harboring, I have no remark to make, except that two juries have successively found the defendant guilty on the evidence, and we are not disposed to interfere by granting a new trial.

The motion is therefore dismissed.

O'NEALL and BUTLER, Justices, concurred. EARLE, J. absent at the hearing, but concurred in the judgment.

Thompson for the motion.

Attorney General, contra.

The State *ex relatione*, David Truesdale v. Town Council of Moultrieville.

THE STATE *ex relatione* DAVID TRUESDALE v. TOWN COUNCIL OF MOULTRIEVILLE.

In the act incorporating the village of Moultrieville, the power of making bye-laws is conferred on the Town Council; The act further provides "that the said Town Council may affix fines for offences against their bye-laws, and appropriate the same to the public uses of the island; but no fine shall exceed twenty pounds sterling for any *one offence*: which fines, where they exceed five pounds sterling, may be recovered in the Court of Common Pleas in Charleston, and when under the sum of £5, before the Intendant and Wardens, or any two of them."

An Ordinance of the Town Council provides "that from and after the passing of this ordinance, it shall not be lawful for any person, or persons, at any time to cut down and make use of the cedars, or other trees, on the east end of the island, known as the "myrtles," for posts, ship timber, or for any other purposes whatsoever, except for fascines to resist the encroachment of the sea : any person, or persons, offending in the same shall forfeit and pay for *each* and *every* offence, to the use of the corporation, the sum of \$5, to be recovered before the Intendant and Wardens."

The relator in one proceeding before the Intendant and a Warden, and by one judgment, had been convicted of forty different offences under this ordinance, and fined \$5 for each offence, making an aggregate of \$200; each offence being supposed to consist in each tree by him cut down.

The specification of the relators offence, was "that he *cut down* at various times, a cedar tree, and did from time to time continue cutting down the same, until he committed one hundred violations of the ordinance aforesaid, by cutting down one hundred trees : " Held insufficient in not setting out that the relator "made use of the cedars" by him cut down, as the offence under the ordinance does not consist merely in cutting down, but in cutting down and making use of the trees.

The matter, as charged in this specification, amounts to no more than a *single offence*, for it may well be that every tree cut down by the relator, of which he stood convicted, were cut on one day, and under the ordinance the cutting down more trees than one, *at one time*, would be but *one offence*.

Under the act of incorporation above referred to, the Town Council had no power by *one* judgment to fine for more than £5. This is limited by the act, and according to its very words, "where the fines exceed £5, they are to be recovered in the Court of Common Pleas for Charleston." In this case, the fines imposed and about to be collected under the warrant

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of the Town Council, are far beyond the sum thus limited. It will not do to say they are for separate offences. They are imposed at one sitting, and for offences anterior to it, and thus make an aggregate of fines incurred by the party beyond £5, and one, therefore, according to the charter, to be sued for and collected in another jurisdiction. Prohibition ordered.

Before EARLE, J., at Charleston, May Term, 1838.

This case came up on a motion for a prohibition made before his honor, Judge Earle, whose report of the case is as follows:—
“This was a suggestion for a prohibition to restrain the respondents from collecting certain fines which they had imposed on the relator, for alleged violations of the by-laws and regulations of the Town Council. The offences consisted in cutting down cedar trees for posts, at a place called the Myrtles, on Sullivan’s Island; and he was charged in the written specification made out at the trial, “with having cut down a cedar tree at various times, and continued so to do from time to time, until he committed one hundred violations of the ordinance, by cutting down one hundred cedar trees.” The relator appeared by counsel before the tribunal prescribed by the charter for the trial of such offences; and the trial proceeded. The relator was convicted on evidence, of having violated the ordinance referred to, forty different times, and for each offence was fined five dollars; and an execution was awarded, directing the marshal to collect each fine from the relator: and the question seemed to be on the jurisdiction of the Council to hear and determine this prosecution. The ordinance, as I construe it, provides a penalty of five dollars for each tree cut down; each constitutes a separate offence: and the jurisdiction is not ousted because the defendant cut so many as to make a large aggregate of penalties. Nor did it seem to me to be irregular, or to deprive them of jurisdiction, to include them in the same proceeding or prosecution. The insufficiency of the specification on which the trial was had, did not appear to be a ground for prohibition. And the motion for the writ was refused.”

The relator appealed from the decision of the Court below, and now moved to have the same reversed and that a prohibition issue,

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on the ground, That the facts stated by the relator in his suggestion were such as to entitle him to a writ of prohibition, and that the demurrer admitted those facts.

CURIA, per O'NEALL, J. In the act incorporating the village of Moultrieville, the power of making by-laws is conferred on the Town Council, "And the said Town Council," (in the language of the act,) "may affix fines for offences against their by-laws and appropriate the same to the public uses of the Island; but no fine shall exceed twenty pounds sterling for any one offence—which fines, where they exceed five pounds sterling, may be recovered in the Court of Common Pleas in Charleston, and where under the sum of five pounds, before the Intendant and Wardens, or any two of them."

The ordinance under which the relator has been fined, is in the following words, "That from and after the passing of this ordinance, it shall not be lawful for any person, or persons, at any time to cut down and make use of the cedars, or other trees, on the east end of the island, known as the Myrtles, for posts, ship timber, or for any other purposes whatsoever, except for fascines to resist the encroachment of the sea. Any person, or persons, offending in the same, shall forfeit and pay for each and every offence, to the use of the corporation, the sum of \$5, to be recovered before the Intendant and Wardens, or any two of them."

The relator, in one proceeding and by one judgment, has been convicted of forty different offences under this ordinance, and fined five dollars for each offence, making an aggregate of \$200. The "each offence," of which he has been convicted and for which he has been fined, consists in each tree by him cut down. Looking to the ordinance, the offence we find is defined to be, "to cut down at any time and make use of the cedars on the east end of this island, known as the myrtles." The specification of the relators offence, is that he "cut down" at various times a cedar tree, and did from time to time continue cutting down the same, until he committed one hundred violations of the ordinance aforesaid, by cutting down one hundred trees. To say nothing about this specification, not setting out that the relator "made use of the cedars" by him

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cut down, which would have been a fatal objection to an indictment. I am satisfied that this is really as charged, but a single offence. It is a trespass with a continuando, which is in law but one offence. For it may well be that every tree cut down by the re-lator, of which he stands convicted, were cut on one day. According to the ordinance, the cutting of more trees than one, at one time, would be but one offence. It seems to me, therefore, that the Town Council exceeded their powers, in convicting under this charge, for forty offences. Independent of this view it is plain that they had no power, by one judgment, to fine for more than £5. This is limited by the act of incorporation. Indeed, according to its words, "where the fines exceed £5, they are to be recovered in the Court of Common Pleas for Charleston. In this case, the fines imposed and about to be collected under the warrant of the Town Council, are far beyond the sum thus limited. It will not do to say they are for separate offences. They are imposed at one sitting, and for offences anterior to it, and thus make an aggregate of fines incurred by the party beyond £5, and are, therefore, according to the charter, to be sued for and collected in another jurisdiction.

The motion, therefore, to reverse the decision below and for the writ of prohibition, is granted.

GANTT, EVANS and BUTLER, Justices, concurred. RICHARDSON, J., absent from indisposition. EARLE, J., absent.

M'Crady, for the motion.

Wilson, contra.

Jane Patton, A. Kennedy and J. Foster v. John Magrath and J. P. Brooks.

JANE PATTON, Adm'x., and A. KENNEDY and J. FOSTER, Adm'rs. of
WM. PATTON, deceased, v. JOHN MAGRATH and J. P. BROOKS.

In an action of *assumpsit*, the declaration counted upon a joint contract by the defendants, to carry 14 bales of cotton for freight from Hamburg to Charleston, in the steamboat *Augusta*, of which the defendant Magrath was owner, and the other defendant Brooks, master; and alleged a loss of the cotton by negligence. The evidence of the contract was a bill of lading for the cotton shipped on board the *Augusta*, signed by the defendant Brooks, the master only. Held that the contract was several and not joint, and that the defendants were improperly joined. New trial ordered and that at the hearing of the case below, the plaintiffs would be obliged to be nonsuited.

The *master* of a vessel as well as the *owner*, is liable to the merchant, or shipper of goods, for damages, in case of injury to the goods or their loss. But their liability is *several* and *distinct*. The *master* is liable precisely to the same extent and in the same form of action, as the owner; but he is liable in a different character and on a different ground. Where he has no property in the vessel and has only the conduct and management, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship and of the profit which they derive from it, by the receipt of the freight money. The *master* is also liable on his own contract for the transportation of the goods, and by virtue of his taking charge of them for that purpose. The liability of the *owners* is *implied* by law, from the nature of the employment, on the ground of public policy. The liability of the *master* seems rather to be by *express* undertaking, and although he is not owner and receives no part of the freight, yet, on the same ground of public policy and in favor of commerce, he is made personally responsible on his undertaking, even where the owners are known, which is thus far a departure from the general law of principal and agent.

In an action on the *case* against several joint defendants, the plaintiff may, *it seems*, recover, on proof of a sufficient cause of action against *one*, and the joinder of too many defendants furnishes no objection to such action, or a recovery. But the rule is otherwise in *assumpsit*, and is perhaps questionable when applied to an action on the *case ex quasi contractu*. The case of *Govett v. Radndige et al.*, 3 East. 63, and the subsequent cases on this subject commented on by the court. The result of the later authorities would seem to shew, that in actions on the *case ex quasi contractu*, as well as of *assumpsit*, against several defendants, the plaintiff must shew a joint liability of all, or he will fail.

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In this action, whether the declaration be considered as strictly a declaration in *assumpsit*, or as a declaration in *case ex quasi contractu*, the general and well settled rules of pleading and evidence will apply. The plaintiff must sue all the joint contracting parties, or the defendants may plead in abatement. He *must* sue in the same action *only* the joint contracting parties, or he will fail at the trial.

Although the master and owner of a vessel are both liable to the merchant, as carriers, for the loss of goods, yet they are liable *severally*, and a *joint* action cannot be maintained against them.

Before BUTLER, J., at Charleston, January Term, 1839.

This was an action of *assumpsit*. The declaration contained three counts, each of them charging a joint contract by the defendants, to carry fourteen bales of cotton, for freight, from Hamburg to Charleston, in the steamboat *Augusta*, and alleging a loss of the cotton by negligence, of which steamboat the defendant Mr. Magrath, was owner, and Capt. Brooks master.

The plaintiffs produced and proved the following bill of lading:

"W. Patton, 14 bales.		Received, Hamburg, S. C., the 30th
332	335	day of Nov. 1832, of Covington & Fair,
333	335	on board the steamer <i>Augusta</i> , now lying
362	332	at Hamburg, and bound for Charleston,
337	337	fourteen square bales cotton, marked and
341	333	numbered as per margin, which we pro-
343	318	mise to deliver in like good order, at the
346	325	aforesaid port, to Boyce, Henry & Wal-
		ter, or to their assigns, on paying for the
		same at ———

In witness whereof, the agent, or clerk of said boat, has signed two receipts of same tenor and date, one of which being accomplished the other to stand void.

J. P. BROOKS."

And proved by Mr. Walker, one of the consignees, that the cotton was not delivered.

It was proved by the defendant, Mr. Magrath, that William Harper, of *Augusta*, was agent of the boat, that it was no part of the employment of Capt. Brooks to sign bills of lading; that the bills of

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lading were signed by the agent; and that the agent was instructed to receive no cotton without a special acceptance, excluding liability for fire; and this was generally known, and that no such bills of lading as the one in question, were ever given by Mr. Harper; and that Capt. Brooks did not sign bills of lading, and that this must have been signed without reflection.

The mate and engineer, who are dead, had signed the protest, and the same was read, by which it appears that the cotton was burnt on the 3d day of December, 1832, at Steel Creek, fire breaking out in the night, on board the lighter, in which it had been brought down the river, to that place, and that no precaution had been omitted to guard against fire, and the cause of the fire was unknown.

The defendants objected to the misjoinder of parties, by which Mr. Magrath was deprived of the benefit of Captain Brooks' evidence; and insisted that the contract was several, and not joint, and that the plaintiffs could not recover in this action.

The plaintiffs refused to take a nonsuit, and on the right of the plaintiffs to maintain this action, his Honor reserved the point, and left the question of neglect to the jury, who found for the plaintiffs the full amount of the value of the cotton, and interest, without any distinction.

The defendants now moved the Court of Appeals for a new trial, on the grounds: 1. That the contract declared on is several and not joint, and that the defendants are improperly joined. 2. That the master is liable on the bailment, and the owner on the contract for freight, and the freighter is entitled to sue either of them, but not to sue them jointly: and the contract not being proved as laid, and the plaintiffs refusing to be nonsuited, the verdict should have been for the defendants.

X CURIA per EARLE, J. That the master of a vessel, as well as the owner, is liable to the merchant, or shipper, for damages, in case of injury to the goods, or their loss, is a well settled principle of the law of carriers. The mode in which the liability is to be enforced, is the question now presented for consideration. The master is liable to the shipper, precisely to the same extent, and in

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the same form of action, as the owner is ; but he is liable in a different character and on a different ground. Where he has no property in the vessel, and has only the conduct and management, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship and of the profit which they derive from it by the receipt of the freight money. The master is also liable on his own contract for the transportation of the goods and by virtue of his taking charge of them for that purpose. The liability of the owners is implied by law from the nature of the employment, on the ground of public policy. The liability of the master seems rather to be by express undertaking, and although he is not owner and receives no part of the freight, yet on the same ground of public policy and in favor of commerce, he is made personally responsible, on his undertaking, even where the owners are known, which is thus far a departure from the general law of principal and agent. In this action, it is attempted to make the master and owner jointly liable in the same action, and a verdict has been taken for the plaintiffs, subject to the opinion of the court, on the question whether they can be jointly sued.

The first material inquiry is, whether this declaration is in case, or in assumpsit ; for if it be clearly a declaration in case, then according to *Govett v. Radnidge et al.*, 3 East. 63, the plaintiffs might recover, on proof of a cause of action against one and the joinder of too many defendants, would not be fatal. That was not an action on the custom against the owners or master of a vessel, but against several, for carelessly, negligently, and imprudently behaving and conducting themselves, in loading a hogshead of treacle, which they had the loading of, for a reward, whereby it was let fall, broke and damaged. On the frame of the declaration it was considered a count in case, and the plaintiff had a verdict against one only. Yet the cause of action obviously arose out of a contract to do the particular work for hire. The plaintiff was allowed to consider the breach of duty as a tortious negligence, rather than as forming a breach of promise, implied from the consideration of hire.

The declaration in the case before us, would seem to be in as-

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sumpsit. It has all the form and requisites of assumpsit: the statement of the consideration, the undertaking and the non-performance. I apprehend no particular form of words can be requisite to make a count in assumpsit, although in the old forms *super se suscepit*, seem to have been so considered.—Dale v. Hall, 1 Wils. 282. Since the cases of Powell v. Layton, 2 B. & P. (new R.) 365, & of Max v. Roberts et al., Ib. 454, the authority of Govett v. Radndige et al., has been much shaken, so far as it went to decide that even in case *ex quasi contractu*, the joinder of too many defendants was not fatal, either by plea in abatement or in arrest of judgment. Powell v. Layton, was case in the form of tort, against one of several joint owners of a ship, for not carrying goods; plea in abatement of the non-joinder of another joint owner, and demurrer to the plea. Sir James Mansfield, in delivering the opinion of the court, said “it seems to be admitted, nor indeed can there be a doubt on that head, that if this action is founded in contract, the plea in abatement is good,” and although the word *suscepit* was not used, yet as the nature of the charge was, that the defendant agreed to carry the goods and had failed in the performance of his agreement, it could make no difference that the word *suscepit* was not used. He could not understand how an action against a carrier, on the custom, came to be considered an action in tort.” As to the use of the word *suscepit*, Dennison, J., in a former case, Dale v. Hall, had considered that the use or omission of it made no difference, and that an action against a carrier is founded on contract. In Max v. Roberts et al., Sir James Mansfield held the same doctrine; and in an action on the case against several joint owners of a ship for not carrying goods for freight according to agreement, and alleging a deviation, the plaintiff failing to prove all the defendants to be joint owners, it was held that he could not recover, even against those whom he proved to be joint owners; and in Weale v. King, 12 East, 452, Lord Ellenborough held, even in case for deceit in a warranty, where it arose in a joint sale of sheep by two, as their joint property, that the joint interest and joint sale of both being described as the foundation of the joint warranty, were essential, and must be proved as laid; and the plaintiff was nonsuited. It is certainly difficult to reconcile this case with Govett v. Radndige, upon

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the grounds taken in the latter case, and it is impossible to add any thing to what was said by Sir James Mansfield in the cases already cited from the common pleas, to shew that in all the cases against carriers on the customs, whether the action be case or assumpsit, the duty of the owner or master arises by contract, the merchant agrees to pay the freight and the carrier to carry the goods ; and it would be strange, as it is certainly unreasonable, that the whole character of the action, the evidence to be offered, and the rights of the parties, should depend on the use or omission of the words *super se suscepit*. The cases of *Powell v. Layton*, and *Max v. Roberts et al.*, are regarded by Mr. Chitty as having overruled *Govett v. Radndige*, and they have since been followed in the English courts.

Whether, therefore, the declaration here be considered as strictly a declaration in assumpsit, (of which I think there can be no doubt,) or as a declaration in case *ex quasi contractu*, the result will be the same, and the general and well settled rules of pleading and evidence will apply. The plaintiff must sue all the joint contracting parties, or the defendants may plead in abatement. He must sue, in the same action, only the joint contracting parties, or he will fail at the trial. He must prove a joint liability, either by express contract, or implied by law, from the relation of the parties and the nature of their undertaking and employment ; and this brings us to the consideration of the principal question, are the defendants in this action to be regarded as joint contractors, either by express agreement or implied liability? If they are, the action is well brought ; if they are not, the plaintiffs must fail. And here perhaps it might be sufficient to refer to several treatises of established authority, where it is said, that although the master and owner are both liable, yet they are liable in distinct characters, and on distinct grounds, and a joint action cannot be maintained against them. In 2 Liv., on Agency, 267, it is said the remedy against the master and owner is twofold, and in pursuing his remedy against them, the plaintiff must take care to describe the defendant by his real character, and *Richwood v. Footner*, before Lord Kenyon at N. P. in 1790 is cited, where in an action at law against a person as master, and it appeared at the trial that the defendant

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was not master, but owner, the plaintiff was nonsuited. Abbott, in his treatise on shipping, 114, (which says, Mr. Justice Story has acquired a deserved reputation for accuracy and extent of information,) uses almost the same language and refers to the same case before Lord Kenyon. Indeed, in all the treatises on the subject, and in all the cases where the point has been discussed, the liability of the master is spoken of as cumulative, accessory, something in addition to the liability of the owner. Lord Mansfield, in *Rich v. Coe*, Cowp. 636, says, "whoever furnishes supplies for a vessel has a treble security: 1. The person of the master. 2. The specific ship. 3. The personal security of the owners. The master is personally liable as making the contract. The owners are liable in consequence of the master's act, because they choose him; and although Molloy, and Holt, Ch. J., in *Boson v. Sanford*, seem to put the liability of the owners on account of their employment of the ship and deriving a profit from it, it is still a different liability from that of the master, and is rather implied than express. If this contract is joint, how does it happen that in the whole range of English and American cases, the research of counsel has not enabled him to find a single precedent, of a joint action against master and owner? The want of such a case is a strong argument against the doctrine.

But there are other tests, which will more conclusively shew that the defendants are improperly joined. If their liability is joint, then they not only may be joined, but must be joined; and if one only is sued, he could plead in abatement, the non-joinder of the other; or their contract must be joint and several; not only can no case be found where they were joined, but no case can be found of a plea in abatement, by one, of the non-joinder of the other, a proof that they have always been regarded as distinct and several liabilities. As I had occasion to remark before, during this term, in another case,* I cannot conceive of a joint and several liability, unless by express agreement, nor of a joint liability against several, that does not arise at the same time, by the same act, and I may add, in the same character, against all who are liable at all.

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If they can be sued jointly and must be sued jointly, it follows that they must jointly sue, on all contracts in reference to the vessel or freight. One could not sue without the other. If he were to do so, he would fail at the trial on proof that there was an owner or master not joined in the action, as it might be brought in the name of one or the other. Now, it is well settled that either may sue on such contracts in his own name. The master sues for his owner and the owner for himself: the one as agent, the other as principal. Indeed, I apprehend their right to sue and liability to be sued, depend at last rather on the law of principal and agent, with the modification I have before expressed, made in favor of commerce, by extending the liability of the agent personally.

There are other tests, which may further demonstrate that they cannot be joined. If the contract and liability be joint, all the incidents of a joint contract at law must follow. Since the learned judgment of Lord Mansfield, in *Hambly v. Trott*, Cowp. 370, it would hardly be doubted, if an owner of a vessel, having received goods to carry for hire, should die, the action would survive against his executor. Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor of another, or a promise by the testator, express or implied, the action survives against the executor. Where the cause of action is tort, or arises *ex delicto*, supposed to be by force and against the peace, then the action dies. If then this contract of master and owner be a joint contract only, and the owner die, the master only would be liable at law, and the merchant would be driven into equity, against the representatives of the owner. This would seem to be a singular result, where the liability of the owner arises from employing the ship and receiving the freight, the master being only his agent; in other words, if the principal die his *estate* is discharged at law and the agent is substituted to the whole responsibility.

These liabilities as between each other, if properly considered, will also show that there is not a joint contract. But for the custom and policy, the master would be liable only for negligence. He receives no compensation from the shippers. He is employed and paid by the owner, and in the law of principal and agent, is

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liable only to the owner for negligence. The law of joint contracts is, that if one pay all, he may compel contribution ; but between the master and owner, whether sued jointly or not, the principle of contribution cannot apply at all. For loss, arising otherwise than from the negligence or default of the master, the owner alone is ultimately responsible ; for if the master be sued, he may make the owners refund—on the contrary for such as do arise from his negligence or default, he alone is ultimately responsible, and the owner if sued, may recover over from him. The principle of joint contracts does not apply. Their liability is in distinct characters, on different grounds, and ultimately as between themselves, to a different extent.

It seems to be clear, therefore, on reason and authority, that they cannot be joined as co-defendants in the same action.

A new trial is therefore ordered, and at the hearing below the plaintiff will have to be nonsuited.

GANTT, O'NEALL and BUTLER, Justices, concurred.

Petigru & Magrath, for the motion.

Hunt, contra.

NOTE.—In actions *ex contractu* against several, it must appear on the face of the pleadings, that their contract was joint, and that fact must also be proved on the trial ; and if *too many* persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error ; and if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial *if he fail in proving* a joint contract : for though in actions for *torts* one defendant may be found guilty and the other acquitted, yet in actions for the breach of a *contract*, whether it be framed in *assumpsit*, *covenant*, *debt*, or *case*, a verdict or judgment cannot in general be given in a joint action against one defendant without the other. See Chitty, Plea : 1 vol. p. 31.

R.

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A. S. MARVIN v. COLIN M'RAE, (Survivor.)

Colin M'Rae (the defendant) and one George C. Brown, were merchants trading under the name of Colin M'Rae & Co. Brown advanced money to the firm and took their note payable to himself or order. Brown being indebted to the plaintiff (Marvin,) was arrested on a bail writ at his suit, and delivered the note to Cohen, the attorney of Marvin, and was thereupon discharged from the arrest. The note was not indorsed. Shortly afterwards and before the note was due, Cohen gave notice to M'Rae of the transfer of the note and of the circumstances under which he had received it. M'Rae replied, "that in the settlement of the concern of M'Rae & Co., he would retain money enough to pay the note." Cohen saw M'Rae frequently afterwards and he repeatedly made the same promise. On the 17th of March, 1835, after the death of Brown, Cohen again applied to M'Rae for the money, and was informed by M'Rae that he had settled with Brown; that he told Brown, he (M'Rae) must retain money to pay this note; that Brown replied, never mind, allow me to take the money and I will pay the note," and that he permitted Brown to do so. Held, that Marvin was entitled in an action for *money had and received*, against M'Rae as survivor, to recover the amount of the note. The nonsuit ordered by the court below set aside.

Though a verbal transfer of a note payable to order, or its delivery to another by the payee without indorsement, conveys no right of action upon the note, against the maker, yet in all other respects the holder is as much the owner of the note, as if it had been indorsed, and he may sustain an action in the name of the payee and recover the money for his own use.

The cases on this subject go upon this principle, that by the transfer, the holder is the agent of the payee to receive the money, and that this agency is coupled with a trust which is irrevocable.

The general principle in relation to the action of assumpsit for money had and received, is this, that if one has money in his hands which belongs to another person, that person may sue the receiver in this form of action and recover the amount from him.

Where there is a special contract still open and something remains to be done beside the payment of the money, the action must be on the special contract; but where all has been done on the part of the plaintiff, and he has nothing to do but to prove the payment of the money he may sue on the general count.

Marvin v. M'Rae, Survivor.

Before EARLE, J., at Marion District, 1838.

The report of this case by his Honor the presiding Judge, is as follows :

"The declaration contained a count on a special assumpsit, and the usual money counts. At a former term before His Honor Judge Richardson, there had been a demurrer to the declaration which he sustained, and gave judgment for the defendant. The Court of Appeals in Charleston, it was said, decided as to the special count, and that the judgment for defendant on the money counts was set aside. In this state of the case two motions were made : 1. by the plaintiff for leave to execute a writ of inquiry, on the ground that the demurrer was overruled. 2. by the defendant to have the postea delivered to him because the demurrer was sustained as to the special count and there was nothing proved that could sustain the money counts.

As the proceedings of the Court of Appeals were not present and I could not be accurately informed of the grounds of their judgment, I thought it safest to hear the whole case on the money counts. I refused the plaintiff's motion to execute a writ of inquiry, and also the defendant's motion to have the postea delivered to him. I gave leave to the defendant to plead over to the money counts—and issue being joined the trial proceeded.

Mr. Cohen was the only witness, and deposed that Colin M'Rae and George C. Brown composed the firm of Colin M'Rae & Co. Brown was arrested in the Federal court at the suit of the plaintiff for a large amount, and transferred to the witness, as the agent of Marvin, many notes; and among them the note which was the subject of this suit; given by C. M'Rae & Co. to George C. Brown himself. Shortly afterwards and before it became due, Mr. Cohen saw M'Rae and informed him that he held this note, and also of the circumstances under which he held and had obtained it. M'Rae replied, "that in the settlement of the concern of M'Rae & Co., he would retain money enough to pay the note." Cohen saw him frequently and he repeatedly made the same promise. On the 17th March, 1835, after the death of Brown, saw him and asked him for the money. He replied that he had settled with Brown,

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and told him that he (M'Rae) must retain money to pay this debt or note; but Brown had said, "never mind, allow me to take the money and I will pay the note," and he (M'Rae) had permitted Brown to do so. The witness stated that he was induced entirely by the promises of M'Rae not to proceed against Brown, from whom he might have collected the money. The note was for \$338, dated January, 1831, signed C. M'Rae & Co., payable to George C. Brown, or order, at 60 days, and not endorsed.

I was of opinion that the case made did not vary much from the statement of the special count, which on demurrer had been held insufficient; and without that, I thought and so held, that on the proof the plaintiff in no form of pleading had made a case on which he could recover.

I ordered a nonsuit, with leave to move the Court of Appeals to set it aside."

The plaintiff now moves the Court of Appeals to set aside the nonsuit, on the ground that the plaintiff, upon the proof made, ought to have recovered upon the common counts. Also, to reverse the decision of the presiding judge, allowing the defendant to plead, on the ground that the general demurrer of the defendant having been overruled on the common counts, the judgment ought to have been for the plaintiff on the demurrer.

CURIA, per EVANS, J. The facts of this case are these—Colin M'Rae and one George C. Brown, were merchants trading under the name of Colin M'Rae & Co. Brown advanced money to the firm and took their note payable to himself or order. Brown was indebted to Marvin, the plaintiff, and was arrested on a bail writ. Brown delivered that note to Cohen, the attorney of Marvin, and was thereupon discharged from the arrest. The note was not indorsed. Shortly afterwards and before the note was due, Cohen gave notice to M'Rae of the transfer of the note and the circumstances under which he had received it. M'Rae replied that in the settlement of the concern of M'Rae & Co., he would retain money enough to pay the note. Cohen saw M'Rae frequently, and he repeatedly made the same promise. On the 17th March, 1835, after the death of Brown, Cohen again applied to M'Rae for the

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money, and was informed by M'Rae that he had settled with Brown, and told him he must retain money to pay this note.— Brown replied, “never mind, allow me to take the money and I will pay the note—and he permitted Brown to do so. Marvin sued M'Rae as survivor, in an action for money had and received, and the question submitted to this court is, whether the action can be maintained. In the consideration of this case, I shall assume that M'Rae's promise to Cohen to retain money on a settlement of the concern, was a promise to pay it to Marvin. The words seem to admit of no other rational construction. The case then resolves itself into these questions : 1. Is the promise of M'Rae & Co., made by M'Rae, one of the firm, to pay their own note to Marvin, to whom it had been transferred under the circumstances above stated, a promise binding in law ? 2. Will the action for money had and received lie against M'Rae, as survivor, to recover the money ?

In relation to the first question, I think it wholly immaterial that Brown was one of the firm of M'Rae & Co. As an individual, it was competent for him to make a contract with the firm, and it was in his individual capacity he received the note from M'Rae. He could not sue M'Rae & Co. on the contract at law, because he could not be plaintiff and defendant in the same action. Had he endorsed the note to Marvin, Marvin as an endorsee could have sued the firm. A man may give a note payable to his own order, as well as to the order of another, and such note when endorsed may be sued in the name of the indorsee. I regard Marvin, therefore, as in the same condition he would have been in had Brown not been a member of the firm of M'Rae & Co. In such case, without any promise of M'Rae & Co. to pay the money, he might have brought the action in Brown's name to recover the money, and when collected he might have applied it to his own use. A verbal transfer of such a note, conveys no right of action upon the note ; but in all other respects, the holder is as much the owner as if the note had been endorsed. This I think is fully sustained by all the authorities : In *Morris v. Peay*, 1 Hill. 35, it was decided that the plaintiff on the record, in whose name an action had been brought for the use of a person to whom the note had been delivered, should not be allowed to discontinue the action ; and in

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that case it is said to have been decided in *Taylor v. Holstein*, (not reported,) that a receipt in full from the nominal plaintiff, after the maker knew of the transfer, would not defeat the action. In *Daniel v. Hill*, decided at Columbia, Feb. T. 1837, it was held that where the maker knew that the payee had transferred a sealed note without assignment, a payment to the holder, or even to one who had obtained possession of the note surreptitiously, as it was alleged, was a discharge of the debt—and consequently no action could be maintained by the payee against the maker after such payment. In this case of *Daniel v. Hill*, Daniel the payee delivered the note to one Wimberly in payment; the note was fraudulently obtained from Wimberly by one Riggs, who sold it to Holmes and he to Bonds. Hill paid the money to Bonds and took up the note. After the decision of the case of *Daniel v. Hill*, Wimberly sued Bonds in an action for money had and received. This case was decided in Columbia, November, 1838. The case of *ex parte Cark*, Dudley 111, fully recognizes the doctrine that the bona fide holder of a note not assigned, is entitled to the money, and in that case the sheriff was compelled by rule to pay the money to Cark in preference to the execution creditors of the payee. To these cases, decided by this court, might be added numerous other cases, both English and American. The cases go upon this principle, that by the transfer, the holder is the agent of the payee to receive the money, and that this agency is coupled with a trust which is irrevocable. Since these decisions, I apprehend it will be in vain to say that the promise of M'Rae & Co. to pay their own debt to Marvin, who by law was alone authorised to receive it and discharge the debt, is void either because it is nudum pactum, or within the provisions of the statute of frauds.

If M'Rae & Co. had sued Brown for a debt for money loaned, and Brown owed Marvin a like sum, and it had been agreed among them that M'Rae & Co. should pay Brown's individual debt to Marvin, it would have been the common case put in the books of the assignment of debts by the mutual arrangement of the parties. I cannot perceive that the circumstance, that Brown was a member of the firm of M'Rae & Co., or that the debt was due upon a note, can vary this case from *Crowfoot v. Gurney*, 9 Bing.

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372, 23 Eng. Com. Law Rep. 309. See on this head the cases of *Israel v. Douglas*, 1 H. Bla. 239, *Tatlock v. Harris*, 3 T. R. 180, *Wharton v. Walker*, 4 B. & C. 166.

The remaining question is, will the action for money had and received lie against M'Rae as survivor? In the consideration of this question, I do not consider it necessary to go into an examination of the nature of the action, or the various cases in which it will lie. The general principle to be found in all the cases is, that if A. has money in his hands which belongs to B., B. may sue him in this form of action. It can make no difference that M'Rae has parted from the money. The authorities before cited, show conclusively Brown had no authority to receive it. His dominion and control was gone, and Marvin alone was entitled to the money. If M'Rae & Co. had on the settlement retained the money to pay Marvin, I apprehend there would be no question but that the action would lie. If he had delivered the money to a stranger on his promise to pay Marvin, this would not have discharged his liability to the plaintiff, and I am unable to perceive, as I have already said, that the circumstance that Brown, to whom he delivered the money on his promise to pay it to Marvin, can any more exempt him than if he had delivered it to an entire stranger. It is a mistake to say that because there has been a special contract between the parties, the plaintiff must sue on the agreement. The rule seems to be this, if the contract be still open and something remains to be done besides the payment of the money, then the action must be special. I have always understood, says Tindal, C. J., in the case of *Grissell v. Robinson*, 3 *Bing. N. C. 15, "the distinction as to the obligation to sue on the special contract, rather than on the general count, to be, that where at the time of payment any thing remains to be done, of which the plaintiff must show performance, the action must be on the special contract; but where all has been done and the plaintiff has nothing to do but to prove the payment of the money, he may sue on the general count." In order to recover on a count for money had and received, says Buller, J., in *Straton v. Rastal*, 3 T. R. 370, the plaintiff must show he has equity and con-

* 32 Eng. Com. Law R. 15.

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science on his side, and that he could recover in a court of equity. Upon the whole it seems to me very clear, from the evidence, that the money was in the possession of M'Rae & Co., for M'Rae says on Brown's promise to pay Marvin, he suffered him to take the money. According to all the authorities in equity and justice, Marvin was entitled to receive it. The money was his and he had a right to demand it of M'Rae & Co. whenever it came into their hands.

I am therefore of opinion this action will lie, and the motion to set aside the nonsuit is granted.

GANTT, O'NEALL and BUTLER, Justices, concurred. EARLE and RICHARDSON, J., absent.

Dargan, for the motion.

Munro, contra.

NOTE.—To prevent something like a want of clearness in the application of the principle laid down in the case of *Gressell v. Robinson*, 3 Bing. N. C. 15, (32, Eng. Com. Law Rep. 15,) to the case before the court, it may be proper to remark that upon looking into that case (the case of *Gressell v. Robinson*,) it will be seen to have been an action to recover money alleged to have been *paid* by the plaintiffs to the use of the defendant, under the common count for money *paid*, and not as might be supposed for money *had and received*, by the defendant to the use of the plaintiffs. In relation however to the question whether the common count may be sufficient, or whether the plaintiff must declare specially, the principle may be and probably is the same, whether applied to the case of money *paid* to the defendant's use, or to money *had and received* by the defendant to the use of the plaintiff. In *Grissell v. Robinson*, the plaintiffs had paid *their* attorney, Taylor, for preparing a lease agreed upon between the plaintiffs (the lessors,) and the defendant Robinson (the lessee). The evidence proved that it was the custom for the landlord's attorney to draw the lease, but that it was to be ultimately *paid* for by the lessee. The plaintiffs having paid Taylor for drawing the lease, brought their action against Robinson to recover the amount, as for so much money *paid* by them to the defendant's use. In reference to this state of facts and the *nature of the action brought*, C. J. Tindal remarks, "I have always understood the distinction as to the obligation to sue on the special contract, rather than on the general count, to be, that where at the time of the payment any thing remains to be done under the contract, of which the plaintiff must show performance, the action should be on the special contract; but where all has been done and the plaintiff has only to prove

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the *payment of the money*, then he may sue on the general count; and in order to recover on that count, the plaintiff must show an express or implied assent of the defendant to the payment of the money, or that it was paid upon compulsion for the use of the defendant. Here the money was paid by the plaintiffs to Taylor, their attorney, who had prepared the lease of the premises demised to the defendant. The evidence shows that it is the custom for the landlord's attorney to draw the lease and that it is paid for by the lessee. That being the position of the parties, in what way could a special contract be stated, which in concise expression would not show the money to have been paid to the defendants use?" Mr. Justice Gaselee in the same case remarks, "That upon all contracts for work to be done in a particular way, or at particular times, or for goods sold, to be paid for or delivered at particular times, after the work has been done and the goods delivered, the plaintiff may resort to the general count for work and labor, or for goods sold and delivered." In relation to the common count for money *had and received*, see the following cases in our own courts: *Huckson v. Avant*, 2 Brev. Rep. 264; *Fowler v. Williams*, Ib. 304, 1 M. Con. Rep. 393, 2 Tred. Con. Rep. 750, 1 N. & M'Cord. Rep. 45, 2 N. & M'Cord. Rep. 65, and the other cases collected in "Rices Digest," 2 vol. 181. See also the cases of *Parkerson v. Dinkins*, and *Clark & Wife v. King*, decided at this term, (post.)

R.

ARCHIBALD CLARK & WIFE v. JOHN KING.

Mrs. G., a feme sole, employed one King as an agent to retain counsel for the prosecution of her claims to some lands in Georgia, and for the purpose of enabling him to do so, gave her note to the agent payable to himself or order. King afterwards sold the note to one Lawton, and Mrs. G. intermarried with one Clark, (her co-plaintiff in this action,) who demanded the money from the defendant. HELD, 1. That the defendant by selling the note to Lawton had turned it into money, and that as soon as he did this, it became money in his hands belonging to Mrs. C., to be applied to her use in carrying on her suit in Georgia. 2. That when her husband C. revoked the power originally conferred, and demanded the money from defendant, he was bound to pay it or account for the application of it. 3. That the plaintiffs were entitled to recover the amount on a count for *money had and received*. 4. That they were entitled to recover without proof on their part that the defendant had not employed counsel in pursuance of the agreement under which the note was given. Nonsuit ordered below, set aside.

Charleston, February, 1839.

THIS case came up on a motion to set aside a nonsuit granted by his Honor the Recorder, upon the trial before him at November term, 1838, of the city court of Charleston. The report of the case by his Honor the Recorder, is as follows :

“ This was assumpsit for the breach of a contract made between Mrs. Clarke (then Mrs. Gist,) before marriage, and John King, the defendant, for the prosecution of claims of Mrs. C. to certain lands in Georgia. The evidence, most of which is taken by commission, proved the contract : and that Mrs. C. having no money to advance to King for the purpose of feeing lawyers, (which it appears he required,) gave him the note for \$300 to raise money and apply it in that way. The declaration independent of the count on the special contract, contained the usual money counts. A record of a judgment from the common pleas, in which Roger B. Lawton was plaintiff and plaintiffs were defendants, was produced to prove that the note above referred to had been passed to the said R. B. Lawton, and that he had recovered judgment on the same. J. B. Thompson, Esq., plaintiff’s attorney, was sworn and testified that he defended Clarke and wife in the above case of R. B. Lawton. Lawton recovered upon proof of being a holder for a valuable consideration ; that Judge Richardson who tried the case stated in his charge, that Lawton being a holder for a valuable consideration and no party to the original fraud, was entitled to recover. Here the testimony closed. Defendant’s counsel moved for a nonsuit on the ground that there was no evidence of a breach of contract. Mr. Thompson in resisting the motion admitted that he had failed to prove a breach of the special contract, but that he had a right to abandon that and resort to his money counts. I took the law to be otherwise. Where a special contract is proved to exist, unrevoked and unbroken, the parties must stand to it, and cannot abandon it and rely upon the money counts. In this particular case the receiving of the note was part and parcel of the contract. King was authorised to raise money upon it and apply it to a particular object ; and for aught that appeared in the evidence he might have done so, or what would have been equivalent, incurred obligations on the faith of it. At all events it was not proved that he had not done so ; in other words, it was not proved

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he had violated his contract. Taking this view of the case, I ordered the nonsuit. After the nonsuit was granted, Mr. Thompson proposed to introduce in evidence a record of a judgment, in which Roger B. Lawton was defendant, and assigned to Clarke, and to prove a tender to discount off said judgment the amount of Lawton's judgment against him. This record was brought to the view of the court by Mr. Thompson before he closed his testimony ; but on its being intimated that it could not avail if introduced without proof of the assignment, I understood Mr. T. as abandoning the idea of offering it ; at least he did not press it. Under these circumstances, I did not consider myself at liberty to permit its introduction at this stage of the case without the consent of the opposite side, which being declined I refused to allow it. Its introduction however would not have affected my judgment, as the object of introducing it was to sustain the count for money had and received, of which I did not think the plaintiffs could avail themselves."

The plaintiffs now moved the Court of Appeals to reverse the nonsuit granted, on the following grounds: 1. Because the testimony proved the defendant John King, passed the note in question for valuable consideration, viz. partly in payment of his own debt and partly for cash ; and this was good evidence on the money counts to go to the jury. 2. Because it is submitted the application of the money so received was matter of defence and should have been proved by the defendant. 3. Because it is submitted that in an action for money had and received, all that is incumbent on the plaintiff to prove, is the receipt of the money or its equivalent, by the defendant ; and it is for the latter to discharge himself by proving payment to the plaintiff or to his use. 4. Because it is submitted that the mere fact of the money claimed being to be appropriated in a given manner, does not throw on the plaintiffs the onus of proving a negative, viz. that the defendant did not so appropriate the money received. 5. Because the case proved the money had been procured from the defendant by fraud, and that ground should have gone to the jury. 6. Because the plaintiffs rendered in evidence a judgment assigned to them against Roger B. Lawton, and offered to prove a tender to discount off said judgment the amount of Lawton's judgment against them ; but said tes-

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timony was rejected, and in this it is submitted his Honor erred. 7. Because it is submitted the facts of the case should have been permitted to go to the jury.

CURIA, per O'NEALL, J. It seems to me that in any point of view the plaintiffs were entitled to recover. The special count, (as it is called,) was nothing more than a statement of the facts, on proof of which the plaintiff would have been entitled to recover on the count for money had and received. The plaintiff's case is, that Mrs. Clarke appointed the defendant her agent to prosecute some claims which she had to land in Georgia, and gave him her note as the means of procuring money by which he might employ counsel. The note he turned into money by selling it to Lawton. As soon as he did this, it became money in his hands belonging to Mrs. Clarke, and to be applied to her use in carrying on her suit in Georgia. When her husband revoked this power and demanded the money from the defendant, he was bound to pay it or account for the application of it. The whole error in the case arose from supposing that the plaintiffs were bound to prove that the defendant did not employ counsel. This it will be remembered was in discharge of the defendant, and the plaintiffs were therefore not bound to prove it. The plaintiffs right depended on the fact that the defendant had their money in his hands to be applied to a given purpose. If it was so applied the plaintiff's right of action was discharged; otherwise it remained. This defence was exactly equivalent to payment to the plaintiffs, and it would never have entered into the mind of any one that the plaintiffs were bound to show that the money had not been paid.

The motion to set aside the nonsuit is granted.

GANTT, EVANS, EARLE, and RICHARDSON, Justices, concurred.—
BUTLER, J., absent on duty.

Thompson, for the motion.

Lance and Magrath, contra.

Butler v. N. G. W. & R. W. Walker.

SAMPSON H. BUTLER v. N. G. W. & R. W. WALKER.

Action of covenant. The defendants were contractors to embank a part of the rail road near Blackville; they hired from the plaintiff ten slaves to work thereon, and by their covenant agreed "*not to expose the slaves to rain or other bad weather, or dangers of any kind.*" The defendants also stipulated by their covenant that they would not require the slaves to labor before daylight or after dark. The slaves worked one month, and in February, a day or two before the expiration of the month, the slaves of the plaintiff were discharged from work between sundown and dark. To reach their encampment they had to go around a pond through which the rail road ran at an elevation of about fourteen feet. The defendants' *overseer* said that the defendants had directed him to send the negroes always around the pond and not to suffer them to go through on the rail road. At different times, however, (this witness said,) when they were discharged before night, they had gone through the pond on the rail road. On the evening when the accident occurred, the witness (defendant's *overseer*) said he ordered the negroes of the plaintiff to go around the pond. Just after they were discharged, a hand car belonging to the rail road under the charge of one Costello came up; the *overseer* of the defendant's asked leave to go in it, which was granted, and he got into it; he said he did not know that any of the plaintiff's negroes were aboard until about the time the accident occurred; but Costello testified that the defendant's *overseer* and the negroes applied together for leave to ride through on the hand car. In the midst of the pond, about half an hour in the night, the party with and on board the hand car, found that a *locomotive* was approaching; to avoid which they jumped out of the hand car and some descended by the posts of the road safely to the face of the pond, which was covered with strong ice. The slave (George,) one of the negroes hired by the plaintiff to the defendants, in attempting to descend fell, and was so much injured that he died in a few days.

Upon this evidence the Judge below instructed the jury that the covenant of the defendants "*not to expose the plaintiff's slaves to dangers of any kind,*" included their omission, (when their *overseer* was present,) to prevent the slaves from being in danger, as well as placing them by their command in danger: and that dangers of *any kind*, meant dangers incident to the rail road, as well as others. That passing upon the rail road after night in a hand car was dangerous, inasmuch as it was liable to be run down and crushed by a locomotive." The jury found a verdict for the plaintiff, giving him about one-half of the value of the slave; and a motion for a new trial on the part of the defendants was refused.

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Before O'NEALL, J., at Barnwell, Spring Term, 1838.

THE report of his Honor the presiding Judge, presents all the facts in this case and the questions arising on them, and is as follows :

"The defendants were contractors to embank a part of the rail road near Blackville ; they hired from the plaintiff ten slaves to work thereon, and by their covenant agreed to pay \$12 50 cents per month, hire, and "not to *expose* the slaves to rain, or other bad weather, or *dangers of any kind*." The defendants also stipulated by their covenant that they would not require the slaves to labor before daylight or after dark. The slaves worked one month, and for \$125, their wages, and the interest thereon, it was conceded that the defendants were liable. In February, a day or two before the expiration of the month, the slaves of the plaintiff were discharged from work between sun down and dark. To reach their encampment they had to go around a pond through which the rail road ran at an elevation of about fourteen feet. The defendants' overseer said that the defendants had directed him to send the negroes always around the pond and not to suffer them to go through on the rail road. At different times however, this witness said, when they were discharged before night, they had gone through the pond on the rail road. On the evening alluded to, he said he ordered the negroes of the plaintiff to go around the pond. Just after they were discharged, a hand car belonging to the rail road company, under the charge of Costello, came up : the overseer of the defendants asked leave to go in it, it was accordingly granted, and he got into it. He said he did not know that any of the plaintiff's negroes were aboard until about the time of the accident hereafter to be spoken of. Costello, however, said that he and the negroes applied together for leave to ride through on the hand car. In the midst of the pond, about half an hour in the night, the party with and on board the hand car, found that a locomotive was approaching. To avoid it they jumped out of the hand car, and some descended the posts of the road safely to the face of the pond, which was covered with strong ice. The slave (George,) belong-

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ing to the plaintiff, in attempting to descend fell, and was so much injured that he died in a few days. The only question was, whether the defendants under the terms of their covenant were liable for the injury thus sustained by the plaintiff? I thought they were.— Their covenant not to expose the plaintiff's slaves to dangers of any kind, included I thought their omission (when their overseer was present) to prevent the slave from being in danger, as well as placing him by their command in danger: and that dangers of any kind, meant dangers incident to the rail road, as well as others.— That passing upon the rail road after night in a hand car was dangerous, inasmuch, as it was liable to be run down and crushed by a locomotive."

The jury found for the plaintiff the hire and interest, and about one-half the value of his slave.

The defendants appealed and now moved for a new trial on the following grounds: 1. Because the defendants did not expose the slave in question to dangers of any kind, and were not guilty of any negligence. 2. Because they did not expose him to dangers of any kind within the covenant, or with reference to the particular employment for which he was hired. 3. Because the injury to the slave resulted from accident after the hour of work, or from his own voluntary act, without the knowledge and contrary to the orders of the defendants.

CURIA, per O'NEALL, J. The instruction of the Judge below to the jury, meets the approbation of this court.

The motion is dismissed.

GANTT and RICHARDSON, Justices, concurred.

Patterson, for the motion.

Bellinger, contra.

Charleston, February, 1839.

JOHN PARKERSON v. L. J. DINKINS.

The vendor of a negro, though he sell as the agent merely of the owner and without any express warranty, is liable to the purchaser upon the *implied* warranty of soundness, where he has received notice of the unsoundness and the negro has been tendered back to him, before he has paid over the purchase money to his principal: and in such a case a count for money had and received will be sufficient.

This case was tried in the City Court before his Honor the Recorder, at April Term, 1838.

The following is the report of his Honor the Recorder: "This was an action of assumpsit to recover the difference on a resale of an unsound negro on the implied warranty. The certificate of Dr. Horlbeck was received in evidence by consent. James White sworn: said he called with Parkerson on Dinkins: he tendered the negro back and notified him that the negro was unsound. Parkerson paid to Dinkins \$520 for the negro in his presence. Witness was the agent or friend of Parkerson in purchasing the negro.— When Dinkins was informed that the negro was unsound, he admitted that he had not remitted the money to his principal; and said that he would retain it until Bulger his principal should execute a bill of sale with a warranty. Parkerson notified Dinkins that he looked to him alone and not to his principal. Parkerson knew nothing of Bulger in the business; but Dinkins only. Witness considered the amount paid a sound price: would not have given more. On his cross examination, he said that Dinkins stated he was only agent, and knew nothing of the negro; said he would retain the money until Parkerson was satisfied. The defect in the negro was discovered in a few days. He said Bulger his principal was to come to town in a week or two: he did come. Witness knew he was in town: boarded at the same house with him. Parkerson also knew he was in town. Before the purchase was effected, the negro was examined twice; thinks Parkerson took the negro home on one occasion before the purchase. Witness regarded Dinkins as the agent of Bulger. Dinkins said his instructions were to sell

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for cash. The sale was in July or Aug., 1837. Thos. N. Gadsden proves the account sales: On being asked whether negroes sold as unsound, did not on that account sell very low, he said some persons will run the risk and give a large price, while others will give very little. The prices of negroes, he said, vary very little during the summer. Dr. Horlbeck sworn: said he was requested by Parkerson to examine the negro and did so; she had a limp in her gait, produced from an enlargement of the tendons of her ankle. She was as much cured as she could be; she might have temporary relief; would not have purchased her as a sound negro; the limp could be hardly perceived in her coming towards you. She said she was unable to attend to her duties about house. She was deformed; clearly visible to any one who would examine; very bow-legged. The swelling appeared to be the enlargement of the bone; a person conversant with the subject could have perceived it. Dr. A. G. Howard examined the negro and thought it a case of rheumatism: stated at the time to Mr. Parkerson that she could be cured: he regarded the case as curable: she certainly was not healthy. Thickening is one of the terminations of rheumatism. The swelling was not very large: it was the thickening of the integuments; and not very perceptible. Examined with Dr. Horlbeck, and differed with him. She said she had runaway, and took a cold, and that the swelling arose from that. He said if he wanted a negro for a plantation, he would not have made \$50 difference in her value for this defect; but would not have such a negro about him at all. Says it was chronic rheumatism; it appeared she had not been treated for it at all. A person not in the habit of observing such matters, would not have perceived the defect; she would have required medical treatment; thinks that Bulger, at the time she was examined, offered Parkerson to have her cured. James White recalled: Said before the purchase was closed, he observed to Dinkins that the negro had an awkward gait; his impression was that it was the gait of a country negro. Dinkins said, there is the negro, examine her, I know nothing of her. Here the testimony closed. I charged the jury that if they believed, from the evidence, that a sound price had been paid, and that the negro was so unsound at the time of sale, as materially to

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affect her value, and that the plaintiff did not buy with a knowledge of the fact, he was entitled to recover. I charged that, though the defendant sold as agent and disclosed his principal at the time, yet as he admitted he had the funds in his hands and promised to retain them until the plaintiff was satisfied, he was liable, if the plaintiff in other respects was entitled to recover. I omitted to state that the defendant's attornies, at the close of the evidence on the part of plaintiff, moved for a nonsuit on the ground stated in his notice of appeal, which I refused."

The jury found for the plaintiff.

The defendant now moved to set aside the verdict, and renewed his motion for a nonsuit on the following ground: 1. That the defendant sold as an agent only, and having disclosed his principal at the time of the sale, he cannot be made liable upon the implied warranty of soundness. And failing in the motion for a nonsuit, moves for a new trial on the same ground and also on the following grounds: 1. That the implied warranty was rebutted by the proof which came from the plaintiff's own witness, that the plaintiff had notice of the supposed defect before the purchase, and that the defendant refused to warrant; and that his Honor ought, therefore, to have charged, that the plaintiff having purchased without warranty, was bound by his contract. 2. That even if there were a warranty of soundness, there was no proof of such unsoundness as amounted to a breach of the warranty; and particularly no proof of unsoundness so materially affecting the value of the negro, as to entitle the plaintiff to rescind the contract. 3. That the verdict was, in all respects, contrary to law and the evidence.

CURIA, per RICHARDSON, J. The jury have settled the facts of the case: 1. That the price of the negro was her full value—upon this fact the warranty of soundness followed, by the law of numerous adjudications in South-Carolina. 2. That the negro was unsound at the time of sale.—This fact renders the vendor liable to the purchaser by the same adjudications. It remains to be considered only, whether Dinkins, the agent of Bulger, the owner of the negro, was liable under the other facts of the case. These facts were as follows: Dinkins sold and warranted the negro, as the agent of Bulger; received the purchase money, and before he paid it over to Bulger was notified that the negro was unsound. Par-

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kerson tendered her to Dinkins and said he would hold him responsible. - Dinkins replied he would keep the purchase money until Bulger should execute a bill of sale with a warranty, "until Parkerson was satisfied." If Dinkins (being plainly a mere agent) had in the meantime paid over the money to his principal without notice, he would have cleared himself of personal responsibility.—*Ash v. Livingston*, 2 Bay. Rep. 80; *Waddel v. Mordecai*, Riley's Coll. 17. But when Dinkins had received timely notice that he would be held responsible, and Parkerson had tendered the negro to him on account of a supposed breach of the implied warranty of soundness, the contract was rescinded, provided Parkerson verified the allegation of unsoundness. From that moment Dinkins stood as a provisional stake-holder; and the general count of indebitatus assumpsit against him for money had and received, was competent, and the proper form of action. This proposition is well established in *Ashley v. Reeves*, 2 M'Cord. 432; *Wharton v. O'Hara*, 2 M'Cord. 65. The principle is, that where a contract is rescinded, the parties stand as if no contract had been made.—And for him who offers to rescind and put the parties in statu quo, and who also proves that he had a right to rescind, the same right of action arises as if there had been a mutual rescision. This position stands upon plain principles, and has been established in the cases of *Byers v. Bostwick*, 2 M'Cord. 75; *Hughes v. Banks*, 1 M'Cord. 537. When, therefore, in addition to the timely notice and tender made to the agent, Parkerson satisfied the jury that the negro was unsound at the time of the purchase, his right to recover the money received of him by Dinkins was made clear. If there had been no tender of the negro, the form of the declaration must have been upon the implied warranty; and if the merits of the case would not allow a recovery under that special form, there could be none upon the general count for money had and received.

The motion is refused.

GANTT, O'NEALL, EVANS and BUTLER, Justices, concurred.—
EARLE, J., absent at the argument.

Bailey, Dawson & Brewster, for the motion.
Thompson, contra.

Charleston, February, 1839.

JOHN HASLETT & W. KUNHARDT.

Action on a note against the indorser—question of diligence. The note was payable at sixty days, and fell due on the 23rd and *payable* on the 25th of May, 1837. On the 22d or 23d of May, the maker and his whole family were drowned near Sullivan's Island, and were buried on the 24th. The indorser had been on terms of intimacy with the maker and attended his funeral. On the 25th, notice of non-payment was given to the indorser. The maker, as far as it appeared on the trial, left no will; and up to the time of notice, no administration had been, or indeed could have been taken out on his estate. HELD that all due diligence had been used under the circumstances, and that a formal demand at the *late* dwelling of the deceased and family, (then unoccupied and deserted,) would have been worse than useless, and any other, impracticable or unnecessary. (RICHARDSON, J., dissenting.)

Before BUTLER, J., at Charleston, January Term, 1839.

THE report of his Honor, the presiding Judge, is as follows:—
“This was an action of assumpsit on a promissory note, against the defendant as indorser. The maker of the note was one Horatio Leavett and indorsed by defendant. It was made payable sixty days after date for \$800; the sixty days expired on the 23d of May, 1837, so that the last day of grace was on the 25th; on the 23rd, the maker Leavett, and his whole family, were drowned near Sullivan's Island, and were buried on the 24th or 25th. The defendant, who was the indorser, was intimate with Leavett and attended his funeral. A few days afterwards, perhaps on the 25th, Alexander Robertson, a notary public, gave notice to the indorser that the payee would hold him liable. The defendant said on a subsequent occasion, that he held himself liable to pay the note, supposing that Leavett's estate would prove solvent—the general opinion being at the time of his death that he was a rich man. It turned out, however, that his estate could not pay his debts: and the defendant then contended that he was not legally liable as indorser to pay the note, no demand having been made on the maker's representatives. The plaintiff proved that Leavett left no

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will, or that none was ever found. On this state of facts, the defendant moved for a nonsuit at the trial. I overruled his motion and suffered the plaintiff to take a verdict. On the 25th, when the notice was given to the indorser, a demand would have availed nothing. At that time there could be no administration, and there was not an inhabitant left in the deceased's house. It would have been worse than a mockery to have made a demand under such circumstances. It would have been to resort to the artificial rules of human laws to obviate the decrees of Providence. The reason of a demand ceasing, the necessity for it ceased also."

The defendant renewed his motion for a nonsuit, or new trial, on the following grounds: 1. Because the plaintiff did not use due diligence to recover payment of the note from the maker. 2. Because the circumstances respecting the maker's death and that of his family, do not, and cannot legally, excuse the plaintiff's failure to demand payment of the note at the place where he resided while living, or from not having searched the offices to ascertain who were the maker's representatives, previous to notice being served on the indorser. 3. Because the notice sent to the defendant was insufficient and not a legal notice. 4. Because the evidence offered to establish the fact, that there was no will left by the maker of the note, was incompetent and ought to have been rejected.

CURIA, per BUTLER, J. The reason of a rule will generally direct its proper application. An indorser of a bill, or note, undertakes to pay it, on condition that the maker should fail to do so on the day on which it is legally due and payable, which is the last day of grace. To ascertain whether the maker will pay, a demand is generally necessary, with a view of giving notice to the indorser of non-payment; otherwise, the indorser might be lulled into a false security, and might lose an opportunity of using such means as were in his power to indemnify himself. There are many instances where an actual demand, on the day, cannot be made. In such cases, the holder should give prompt notice to the indorser, when that is practicable. The notice to the indorser is of more importance than a demand on the maker, where circumstances will not allow an actual demand. No rule of law is so inexorably in-

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flexible as to admit of no relaxation or exception. There are some circumstances which would not only render a demand unavailing, but an effort to make one, revolting. Suppose a holder and an indorser of a note, to live in the neighborhood of a city that had been destroyed by an earthquake, and the maker to be involved in the common ruin, would the law require the holder to go to the lake of ruins and go through the form of making a demand, with the purpose of fixing the liability of the indorser? In the case before the court, it appears that the maker of the note and his whole family were buried on the day before the last day of grace, on which the note was legally made payable. According to the testimony, not a white inhabitant of his household survived; and yet it is said a demand should have been made on a tenantless house, or at some of the public offices. I ask for what end should this have been done? It was impracticable and legally impossible that any demand could have been made. The plaintiff, on the trial, proved the negative, that the maker left no will; and it was legally impossible that there could have been an administrator to represent him, on the 25th, when demand should have been made; on whom then could the demand have been made? It is said that it should have been made at the house of the deceased. Who was there to make any answer to the call of the dunner? He might have rung the bell, or rapped with the knocker, and the only response would have been the echo of the sound in deserted chambers. As the counsel for plaintiff remarked, the notary might as well have clamoured at the recent grave. It was a mockery to make a demonstration of demand, when there *was no one* to receive and answer to it. The law is reasonable in its requirement. *Lex neminem cogit ad vana seu impossibilia.* The plaintiff did what was obviously reasonable, and what commonsense dictated, and that which the law sanctioned. He advertised the defendant, by express notice, that the note was not paid on the 25th, and that he would hold him liable. The defendant was well acquainted with all the circumstances that would excuse the want of demand, and assented to his liability to pay the note. It is said, however, that the notice was not legally sufficient, and was premature. The notice was explicit that the note was not then paid, to wit, on the 25th, nor likely to be paid; and surely

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it was not necessary to recapitulate in it the fact of the maker's death. That would be to suppose that the notice could give more information than the defendant had, who attended the funeral of the deceased. When a note is not paid on the day, the earlier the notice to the indorser, the better, so far as it could answer any purpose. An indorser may well complain that he has received no notice, or one that came to him too late; but it can rarely be a cause of complaint that it is too promptly given. If the defendant had received no notice at all, or one that was given after the time when he could have made exertions to save himself, he might well have complained and demanded exemption. When a demand cannot be made, that fact should be communicated to the indorser within a reasonable time, and an omission to do so may well be taken advantage of by him, as was properly held in the case of *Price v. Young*, 1 N. & M'Cord. Rep. 438. It was supposed that the above case is conclusive of the question in this; so far from it, in my opinion it is different from the one before the court in many essential particulars. The most striking difference is, that in one there was no notice to the indorser, and in the other there was.— In the case of *Price and Young*, the note was legally payable on the 26th October, and no notice was given to the indorser until some time in November; this was held to be equivalent to no notice at all. In this case, on the contrary, notice was given on the last day of grace, and when it was ascertained that the note would not be paid. The striking difference between the cases does not end here: In the first case, Bryce, the maker, died in September, more than a month before the note fell due. Within that time his estate might have had a representative appointed by the law, who could answer to the demand. When one dies, administration is usually taken out on his estate within six or eight weeks after his death. This is the probability. Hence an inquiry at the public office might not be unavailing; but it is very different where not more than twenty-five hours have elapsed after one is put in the tomb; within that time no one could possibly be an administrator. In the case of *Price and Young*, Judge Cheves seems to concede, that if it had been proved that the maker was a transient person, having no residence, it would have been a suffi-

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cient excuse for not making a demand, provided that fact was communicated to the indorser by notice. When it is apparent that the maker has left no one in his house, at his death, to represent him, and there was not sufficient time for the law to make a representative, it would be more impossible to make a demand than on a transient person having no residence. Upon the whole, we are satisfied with the circuit decision and refuse the motion.

GANTT, O'NEALL, EVANS and EARLE, Justices, concurred.

RICHARDSON, J., dissenting. The single question is, whether the death of Mr. Leavett, the maker of the note, dispensed with the necessity of the holders making a demand of payment, in order to fix the liability of the indorser. The mournful occurrence of Mr. Leavett's whole family being swept off, at the same moment, cannot modify the established rules of law. Whenever an unmarried man having no family dies, he, like Mr. Leavett, leaves none to represent him; and if he be also a transient man, he further leaves neither known habitation, nor servant, which would be even a clearer instance of utter destitution left behind, than the melancholy one before us; yet Chitty in his authoritative treatise on Bills, lays down this rule, "That the bankruptcy, insolvency, or death of the acceptor of a bill, or maker of a note, *however notorious*, will not excuse the neglect to make due presentation; and in the last case, (death,) it should be made on his personal representative, and in case there be no executor or administrator, then *at the house of the deceased*; or the drawer, or indorser, will be discharged." Comment cannot be necessary. The want of a representative in cases of recent death, must of course be frequent, which brings in the worst alternative, and sometimes there is no fixed habitation, but not in this case. The true question is not upon what the rule is, but whether it has been adopted in South-Carolina. I once struggled against the application of this severe rule, on the second hearing of the case of Price v. Young, 1 M'Cord. 840. In that case, both the maker of the note (Bryce,) and the payee (Price), died before the note was due; but there was no demand or presentment for payment.

There would seem to have been in this case very unusual circum-

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stances to excuse the want of a demand. Yet, Judge Cheves, (perhaps the greatest commercial lawyer ever on our bench,) and the court, adopted the rule expressly; they say, (1 N. & M'Cord. 438) "it was contended that the death of the maker dispensed with proof of demand, unless it had been proved that the maker had a legal representative; but it was correctly replied that such proof was not requisite, but that the law required proof of some efforts to make the demand. If the proper offices had been searched and it did not appear that he had a legal representative, then a demand made at the accustomed dwelling of the maker when alive, would have been sufficient and was necessary, or proof that he was a transient person, or the like, might have been sufficient; but no such proof was given. This ground (of the indorser), say the court, is supported." In this case the rule laid down by Chitty is explicitly adopted, with a third alternative, or proof, that he was a transient man; but that is not surmised of Mr. Leavett. I can perceive, therefore, no distinction between that case and the one before the court, and consider the rule established. It is to be remarked, that at the second trial of Price v. Young, there was proof that Bryce was a transient man, as well as a supposed insolvent, and a verdict being given the second time against the indorser Young, the court delivered no opinion whether that fact would dispense with the demand, but granted a nonsuit to the indorser, for want of timely notice to him. It appears to my understanding, that there arises sometimes a mistake upon the term "demand." It does not always signify a personal request of payment; but it often means a mere presentment or exhibition of the note, at the proper time and place, by some one authorised to demand and receive payment—which is often all that can be done, as where a note is payable at a named bank or town, the presentment is there made, whether the maker be there or not. But it is this kind of authorized diligence which constitutes the demand that fixes the indorser upon notice thereof. *In reference to the indorser*, the holder of a note is never to assume that it will not be paid by the maker, his agents, or friends; an insolvent man, or a deceased, may have made a proper provision, or have friends to act for him. If the holder will assume the contrary, he may do so, and may be

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well commended, as in the present instance; but he must do so at his own risk and not expect to debit his neighbour with the possible loss that may follow his good dispositions. The rights of an indorser, who is only a provisional surety, cannot be thus compromised. The demand of payment, in its proper sense, is matter of substance, and the note must be presented at the proper time and place, with authority to receive payment, and this is the condition precedent to the liability of the indorser under the rule established. The subsequent notice to him, is more a matter of form. See the case of *Halls, Kirkpatrick & Co. v. Howell*, Harp. Rep. 426, for this distinction well laid down.

Philips, for the motion.

McCady & Caldwell, contra.

NOTE.—In the case of *Galpin v. Hard*, 3 M'Cord. Rep. 394, the court say, "the necessity of a personal demand upon the drawer, to render the indorser liable, is superseded in a variety of instances, which would impose on the holder an unreasonable degree of labor and inconvenience. So it seems that if the holder cannot discover the place to which the drawer has removed, it is sufficient to excuse him from making a demand, or where the drawer has removed into a distant country."

In an action on a note by the indorsee, against the indorser, drawn in Charleston, it appeared by the testimony of the notary, that on the day the note became due, he made diligent search for the maker in Charleston, and could not find him, but understood he had removed to Philadelphia; and that he gave notice of non-payment, on the same day, to the indorser. The court held that any demand was dispensed with, and that the indorser was bound. *Gillespie v. Hanahan*, 4 M'Cord. Rep. 503.

In Massachusetts, where the maker of a note died and an administrator was appointed before the note became payable, (the day of payment falling within a year from the time of his appointment,) it was held that the holder might maintain an action against the indorser, without proving a demand upon the administrator at the maturity of the note. *Hale v. Burr*, 12 Mass. Rep. 86. See also Bayley on Bills, 220. R.

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REBECCA RHAME v. JAMES FERGUSON AND JOHN R. DANGERFIELD.

Action of trover for fourteen slaves. One Broad, by his last will and testament, bequeathed certain slaves, with their future issue and increase, to John R. Dangerfield, "*in trust nevertheless, and for this purpose only, that the said D., his executors and assigns, should permit and suffer the said slaves, &c., to apply and appropriate their time and labor to their own proper use and behoof without the intermeddling or interference of any person or persons whomsoever, further than might be necessary for their protection under the laws of this State, &c.*" The testator in his said will further says, "Then I give and bequeath all the rest, residue and remainder, of my estate, both real and personal, to my said friend D. and his heirs and assigns forever; upon trust, nevertheless, and for this purpose only, that the said slaves above mentioned, &c., be permitted and suffered to use and enjoy the said estate, whether real or personal, *for ever, without the interference or meddling of the said D., or any person or persons whomsoever, further than may be necessary to secure to the said slaves the full use and enjoyment of the estate above mentioned.*"

B. died, and the slaves above mentioned came into and continued in the possession of Dangerfield, when the plaintiff through and with her agent S., undertook to seize the slaves, as being liable to seizure *under the act of 1800*—and were about to carry them off. The defendant, D., under the advice and with the countenance, and perhaps the co-operation of the other defendant, F., resisted the seizure of the slaves, and the plaintiff desisted and went off without them; upon which she brought this action of trover.

On the trial below, the Judge gave the following instructions to the jury:

1. "That the effect of Broad's will was clearly to vest in his executor, Dangerfield, the *legal* title to his estate. That at the testator's death, the executor had a right to take possession of the property and use it for the purpose of paying the debts of the estate, and then to do with it as he pleased; whether he would have acted in good faith in appropriating it to himself, instead of obeying strictly the directions of the will, was a question upon which a *court of law* would not undertake to decide. 2. That if the executor gave up the *practical dominion* and control of the negroes, and left them to their own government, they were liable to seizure under the act of 1800. Assuming that the negroes were liable to seizure, upon the question whether the plaintiff acquired a legal title to the negroes by seizure, the Judge stated to the jury that the question presented itself in three points of view: 1. Did the plaintiff have an actual tangible possession of the negroes? 2. Did she so far subjugate them to her power and control, as to make them virtually her prisoners? 3. Had

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the negroes voluntarily surrendered themselves as captives to be taken to Charleston, under S's. proclamation that they must go? The jury were instructed if they should come to an affirmative conclusion on either of these propositions, to find for the plaintiff. The jury found for the defendants, and a motion for a new trial was refused.

Before BUTLER, J., at Charleston, January Term, 1839.

THE report of his Honor, the presiding Judge, is as follows: "This was an action of trover for fourteen negroes, (Daphne, and her children and grand children.) The title of plaintiff to the negroes was founded on an alleged seizure of them, under the act of 1800, as having been emancipated contrary to the laws of the State. The negroes had belonged to G. Broad, who left the following will:

'State of South-Carolina:

In the name of God—Amen! I, George Broad, of the parish of St. John's, Berkley, in the said State, farmer, being of sound mind, memory and understanding, do make, publish and direct, my last will and testament, in manner and form following, that is to say: I will and direct that my just debts and funeral expenses be paid as soon after my death as possible; then I give and bequeath to my friend John R. Dangerfield, of Barnaretta, in said parish of St. John's, Berkley, to him and his executors and assigns forever, my slaves Daphne and her children, Nicholas, Mary, Jacob, Betsey, Sammy, William, Sarah, Frederick, James, George and Simon, and her grand children, John and Betsey, together with the future issue and increase of such as are females: *in trust, nevertheless,* and for this purpose only, that the said John R. Dangerfield, his executors and assigns, do *permit and suffer* the slaves above mentioned, and each and every of them and their future issue and increase, *to apply and appropriate their time and labor to their own proper use and behoof, without the intermeddling or interference of any person or persons whomsoever,* further than may be necessary for their protection under the laws of this State, which now exist, or may be passed hereafter; then I give and bequeath all the rest, residue and remainder of my estate, both real and personal, to my said friend, John R. Dangerfield, above mentioned, his heirs and

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assigns forever ; upon trust, nevertheless, and for this purpose only, that the said slaves above mentioned, and each and every of them, and their future issue and increase, be permitted and suffered to use and enjoy the said estate, whether real or personal, *forever*, without the interference or meddling of the said John R. Dangerfield, or any person or persons whomssoever, further than may be necessary to secure to the said slaves the full use and enjoyment of the estate above mentioned.

Lastly, revoking all former or other wills and testaments, I do hereby declare this to be my last will and testament ; and do hereby constitute John R. Dangerfield sole executor to the same.

In witness whereof I have hereunto set my hand and seal, this 5th day of April, in the year of our Lord 1836.

GEORGE BROAD, [L. S.]

Signed and sealed in the presence of—

SANFORD W. BARKER,

JOSIAH DANGERFIELD,

PRESS M. SMITH.

Proved before Thomas Lehre, O. C. D., on the 7th day of May, 1836. At the same time qualified John R. Dangerfield, executor.

The plaintiff offered the following testimony: John J. Singleary says that he was employed by plaintiff, under a power of attorney, to seize the negroes enumerated in the will ; and that he, in company with plaintiff herself, and Mrs. Dehay, her son and servant, went to the plantation of Broad, about 8 o'clock, on the 31st December, 1837 ; Mrs. Dehay and her son having, however, nothing to do with the transaction. They found no white person on the place, but found some negroes in the dwelling house that had been occupied by Broad in his life time. The witness ordered the negroes out of the house into the yard, and told them that he seized them in the name of the plaintiff, and that they must go with him to Charleston. Dangerfield came and asked witness by what authority he had taken the negroes ; the witness replied, he had seized them for plaintiff, shewed his power of attorney, and read the acts of the legislature under which he was proceeding. Dangerfield replied, it was a pity to drag them through the mud ; and said sooner than they should go that way he would let them have

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his wagon ; and ordered a boy to bring the wagon. It seemed that Dangerfield had been informed by a boy of what was going on, and had dispatched a messenger to colonel Ferguson, who galloped up about an hour after witness and his party had got there : he asked witness for his authority ; witness handed him the power of attorney ; Ferguson looked at it and said, it is all a cheat ; told Dangerfield to order him off, and if he would not go, give him the whip ; and that if that would not do, and more should come than Mrs. Rhame and witness, to shoot ; after giving this advice, which he did apparently under great excitement, Ferguson rode off, leaving the others at the place. Witness said in Ferguson's presence that he could go away peaceably, that he had not come to lose or take life. Whilst they were talking, a boy, (one in dispute,) came up with a duck and a gun ; he put the gun in the house, where there were two or three others. The boy was insolent and witness told him to hold his tongue or he would tie him ; witness and Rhame finally left the place about 11 o'clock, in consequence of threatened violence, leaving Dangerfield with the negroes. Witness said that he had frequently passed the place since Broad's death, and that he had not seen any white person on it ; that the negroes were there, and that he never saw them at work ; saw no signs of cultivation about the house ; there might have been fields at a distance off. That he knew of Dangerfield renting a mill about 15 miles from the place, when he served a writ on him some time before this ; that Dangerfield had a residence said to have been about a mile from the place ; but that he did not think he lived at it when he called to serve the writ. Broad left no blood relations. Broad had married Mr. Huff's sister, and Huff had married Broad's sister ; on the death of Huff's wife, he married Miss Nettles, the present Mrs. Rhame. On the cross-examination of this witness, he said he was at the place about an hour before Dangerfield came and two hours before Ferguson's arrival ; that he was waiting to get off. The witness said he never had the actual possession of any of the negroes ; all he did was to tell them they must go to town with him, or he would tie them. The negroes did not say whether they would go or not. Jane Dehay sworn : is sister of Mrs. Rhame, who staid at her house the night before

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she went to Broad's place ; but had nothing to do with the business, but had her little wagon and was on her way to the city.— She was invited to come in the house by the old wench. She concurred with Singletary as to what occurred ; and said that Ferguson went off before any of the rest. She does not live far from the place ; has seen two of the negroes hunting with guns and dogs ; the dogs run down a wounded deer in her yard ; has seen the negroes passing without a white person with them, and never saw them at work ; witness hurried the party to go on, and she could not tell the reason why they staid. Saw her sister take hold of one little negro and said she'd keep it. Peter Taylor and James B. Taylor, said they had seen two of the negroes, Nicholas and Jacob, hunting cows ; once Dangerfield's little son was along.— Has seen them driving bays for deer. (See my notes if necessary.) Dr. Theodore Gaillard lives near Broad's place, and sometimes attends the negroes who stay there as physician. Knows that the negroes are under the control of Dangerfield ; who makes them work ; some make provisions and others work out as carpenters. Dangerfield pays their taxes and medical bills ; knows that some corn has been sold that was made on the place. The negroes are very orderly and well behaved : he has taken them with Dangerfield to drive for him. Dangerfield lives about half a mile from the negroes, and sees them frequently. The case was argued very elaborately and at great length to the jury. I charged the jury, that by the will of Broad, Dangerfield had a legal title to the negroes ; that a court of law could not take notice of the trust ; that a court of equity might, and perhaps would regard Dangerfield as holding as trustee, and if so, that the negroes might, according to the case of Fable and Brown, (2 Hill. Ch. Rep. 378,) be escheatable. That a court of law could not take notice of the trusts and characterize the title by them. Whether Dangerfield had assented to the freedom of the negroes, and had *in fact*, carried into effect the declarations of the will of Broad, was a question of fact to be determined by the testimony ; that *if de-facto*, the negroes were enjoying the privileges of free people, without the control or interference of a white person, they were liable to seizure, under the act of 1800. This question I submitted fairly to the jury, saying

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to them that Broad's will was a palpable attempt to defeat and evade the laws of the State against the emancipation of slaves; and that if it had been carried into effect, the slaves were liable to seizure. Whether there had been a seizure, was also, in some measure, a question of fact. I said that merely going on a place, and proclaiming ownership, was not sufficient; that the most palpable form of seizure was *manucaption*; but that was not actually necessary; that the possession of and dominion over *negroes*, who were capable of assent, and the influence of motive, could otherwise be acquired and consummated; as by the consent of the negroes themselves, or a removal of them, &c. That such a question must necessarily depend on the circumstances of each case. In the case under consideration, it was by no means certain that the negroes would at any time have gone with the captors by their consent; and whether the captors had the power to force them, was also uncertain. With regard to the conversion by defendants, I charged that Dangerfield had retained the possession of the negroes, and might be held responsible for their value, if the plaintiff's title was perfect; and that Ferguson might also be held responsible for the consequences, although he derived no benefit; provided the negroes were given up in consequence of any violence actually used by him, or by his co-operating with the other; but if Singletary yielded to the moral influence of his opinion, and dread to Dangerfield, who was left alone; he should not be held liable. The distinction between the defendants is of little importance, as the jury found a verdict for both of them, upon other grounds than the one of conversion."

The plaintiff now moved the court for a new trial, on the following grounds: 1. That the will of Broad was an attempt to evade the law of the State; and as the executor qualified, and actually permitted the negroes to live just as the will prescribed; only so far interfering as to protect them against the law, the law was violated, and the slaves emancipated contrary to law, and were liable to seizure. 2. That the judge was mistaken in supposing that the negroes must be actually estrays and derelict, in order to render them liable to seizure; but the very evil example intended to be prevented by the act, was to permit slaves to enjoy all the benefits

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of freedom, under a mere nominal control of white persons. The abandonment meant by law, was the relinquishment of the right usually exercised over slaves, and putting them in a better condition than the rest of the slave population. And in this case, there was not one single instance of any act of ownership, but what was intended for the protection and benefit of the slaves. 3. That in stating to the jury that Dr. Gaillard proved any act of hiring, or paying taxes, &c., was erroneous; as the witness expressly stated that he did not know, of his own knowledge, any of the facts he volunteered to state, and was not present at any hiring, or paying of taxes. 4. Because the court erred on what constituted a legal seizure, and that the judge ought to have charged, that the calling the negroes out and ordering them to be ready to go with plaintiff, was a sufficient seizure of negroes; as without any interference afterwards, they would have been carried off. And the charge that the negroes should be removed away was erroneous, as the congregating them in the yard was sufficient. 5. Because the court erred in charging that Ferguson was not guilty of dispossessing the plaintiff, unless he used actual physical violence. Whereas it is submitted, that his threats of violence was such aiding and abetting Dangerfield, as to constitute him a principal in the trespass. And in fact, the plaintiff was driven away from the negroes and compelled to abandon them. 6. Because the facts proved, brought the negroes fully within the provisions of the act of 1800. The seizure was complete, and the rescue by defendants fully proved, and so the judge, it is submitted should have charged.

CURIA, per BUTLER, J. The effect of Broad's will, was clearly to vest in his executor, Dangerfield, the legal title to his estate. At the testator's death the executor had a right to take possession of the property and use it for the purpose of paying the debts of the estate, and then to do with it as he pleased. Whether he would have acted in good faith in appropriating it to himself, instead of obeying strictly the directions of the will, is a question upon which a court of law would not undertake to decide. If he gave up the practical dominion and control of the negroes, and left them to their own self-government, I was of opinion they were liable to seizure

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under the act of 1800. This was a question of fact that belonged to, and was fairly submitted to the jury. Assuming that the negroes were liable to seizure, the next question was, did the plaintiff acquire a legal title to the negroes by seizure. My charge analysed, was that the question presented itself in three points of view: 1. Did the plaintiff have an actual tangible possession of the negroes? This is the most obvious and general form of seizure. 2. Did she so far subjugate them to her power and control as to make them virtually her prisoners? This might have been effected without a voluntary surrender on the part of the negroes, and depended on the power of Singletary to enforce his authority and secure his captives. 3. Had the negroes voluntarily surrendered themselves as captives to be taken to Charleston, under Singletary's proclamation that they must go? They were capable of doing so. If the jury should come to an affirmative conclusion on either of these propositions, I instructed them to find for the plaintiff. All the questions in the case were submitted under proper instructions—and the verdict of the jury cannot be disturbed.

The motion is dismissed.

GANTT, O'NEALL, EVANS and EARLE, Justices, concurred.

O. M. Smith & Hunt, for the motion.

Petigru & Lesesne, contra.

D. & J. EWART v. T. J. KERR.

The plaintiffs delivered two hundred and fifty bales of cotton to one Hawkins, as a common carrier, to be delivered by him to Boyce & Co., the consignees. The defendant, as agent of Hawkins, delivered two hundred and forty-three bales; but detained the remaining seven *for freight*, and refused to deliver them. Plaintiffs brought an action of trover against the defendant for the seven bales, and on the trial offered to prove that the cotton shipped was damaged, *by the default of the carrier*, to an

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amount exceeding the value of the freight. The judge below overruled the evidence, and nonsuited the plaintiffs. Nonsuit set aside, and new trial awarded. [EARLE and RICHARDSON, Justices, dissenting.]

Under the English law of set-off, in an action by the carrier for freight, where goods have been delivered (though in a damaged condition,) and accepted, the defendant cannot set up a defence by way of discount or set-off, that the goods were damaged; for their statutes of set-off only apply to *liquidated* demands, and not to uncertain or unascertained damages. The freighter, in such a case, is put to his cross action.

Yet, under the discount act of this state, (P. L. 246,) which uses the terms "any accmpt, reckoning, demand, cause or thing against the plaintiff," the damages sustained by goods in their transportation may, in all cases, whether the freight be agreed upon by the parties or not, be set up as a defence to the action by the carrier for his freight; and if such damages are equal to, or exceed the freight, the defendant must recover: and in this point of view, the defence becomes essentially a *cross* action.

Under the law of this state, the carrier's right of lien for freight is only co-extensive with his legal right of action; if his claim to recover in the particular case could not be gainsayed, then it would follow that his *lien* could not be disputed. But as the owner may show in avoidance of his claim to recover freight, that the goods were injured in the transportation, it follows that his *lien* must be liable to be defeated in the same way.

"Where there is no debt, there is no lien;" and if it can be shown that the carrier has injured the goods of the shippers to a greater amount than his whole freight, it cannot be pretended that they owe him any thing: and hence, the owner may maintain trover against the carrier, for the goods which he detains, on account of his supposed claim to freight, and refuses to deliver.

To maintain trover, it is only necessary for the plaintiff to show a right of property and of possession in himself, and a conversion by the defendant.

EARLE and RICHARDSON, Justices, (dissenting,) were of opinion that the carrier's lien for freight entitles him to retain possession of the goods until his freight be paid: that he has a special property in the goods, which can only be divested by payment of the freight or tender of it, and that being in actual possession he is not liable in trover, however else he may be liable, or to whatever extent, for any damages which the goods may have sustained. That according to all the English cases, where the goods are delivered and accepted, in whole or in part (though damaged), the freighter cannot set up the damages as a defence or by way of discount, to an action for the freight, but is put to his cross action. That although it might be admitted, that under the terms of our discount act, the freighter may set up the damages by way of defence or discount, to an action for the freight, yet that the defendant in this case, by delivering the principal part of the goods to the consignees, which they had accepted, was entitled to his freight, and had a right to retain the balance until the freight was paid or tendered; and that trover would not lie against him.

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Before EARLE, J., at Charleston, May Term, 1835.

THIS was an action of trover, for seven bales of cotton. The plaintiffs proved the delivery of two hundred and fifty bales of cotton, in good order, to Michael Hawkins, in Columbia, a common carrier, to be delivered by him to Boyce & Co., Charleston, at one dollar per bale. Defendant, as the agent of Hawkins, delivered two hundred and forty-three bales, and detained seven for freight. Plaintiffs offered to prove that the cotton was damaged to an amount exceeding the value of the freight, by the default of the carrier. His honor, the presiding judge, overruled the evidence, and nonsuited the plaintiffs.

The plaintiffs now move to set aside this order for the following reasons: 1. By the law, as well as the usage of trade, damages for which the carrier is responsible should be settled in the settlement of the freight. 2. Because, when the carrier has not fulfilled his contract, or when his neglect has occasioned damages equal to the amount of freight, there is nothing due to him; and there can be no lien where there is no debt.

CURIA, per O'NEALL, J. This case has been subjected to a great deal of examination, and the result has been a well settled judgment, on the part of a majority of the court, that the nonsuit must be set aside. The cases to be found in the books of reports have, *in general*, little application; they are actions for the recovery of freight when the goods had been delivered. The injury done to them in their transportation is said not to be a matter of defence, but of a cross action; as in the case of *Shields v. Davis*, 6 Taun., 65. The reason of this, in England, is plain. In 1 Tidd's Practice, 603, it is said, "The actions in which a set-off is allowable upon these statutes, (2 Geo. II. c. 22, sec. 15; 8 Geo. II. c. 24, sec. 4,) are debt, covenant and assumpsit for the non-payment of money, and the *demand intended to be set off must be liquidated*, and such as might have been made the subject of one or other of

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these actions. A set-off, therefore, is never allowed in actions upon the case, trespass or replevin, &c., nor in debt on bond, conditioned for the performance of covenants, &c. nor in covenant or assumpsit for general damages, and a penalty or *uncertain damages* cannot be made the subject of a set-off." The damages which goods may have sustained in the possession of a carrier are so uncertain in amount that they could not, in England, be set off; and hence, to an action for freight, the defendant could generally make no defence, arising therefrom. The only case which I have been able to find, having a direct bearing on this case, is from New-York, *Sherman v. Withers*, Anthon's N. P. 166. In that case it was held, "if a common carrier demand compensation on a *quantum meruit*, the owner may show in bar of such compensation, that the goods were damaged in the transportation to an amount exceeding that of a fair rate for the safe carriage."—The reason why that defence is allowed in that case is, because the plaintiff demands compensation by no fixed price agreed upon between him and the defendant, and hence that he cannot recover, where the defendant has received no benefit from the transportation. The direct application of that case to the one in hand, arises out of the change which our discount law has effected in the defence to cases brought for the recovery of freight. By the terms of our act, P. L. 246, "any accompt, reckoning, demand, cause, matter or thing against the plaintiff," may be relied upon as a defence by way of discount. Under this act, the damages sustained by goods in their transportation may, in all cases, whether the freight be agreed upon by the parties or not, be set up as a defence to the action by the carrier, for his freight; and if such damages are equal to or exceed the freight, the defendant must recover. In this point of view, the defence becomes essentially a cross action, and is covered by what is said by Ch. J. Gibbes, in the case of *Shields v. Davis*, in which he ruled that the carrier, although entitled to recover freight when he delivers the goods, is notwithstanding liable to a cross action, for an injury sustained by the goods in their transportation. That which in England required two actions is here attained in one. It is hence that the fact that the goods have been delivered, and that the carrier has

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earned his freight, cannot preclude the defence in this state. That conceding these facts, still he may not be entitled to recover any thing, if the goods have been injured to the amount of the freight. This change in the law must necessarily be carried into the consideration of the carrier's right of lien. His lien is nothing more than giving, by his own act, effect to what may be his legal right by action. If his claim to recover could not be gainsayed, then it would follow his lien could not be disputed; but if the owner may show, in avoidance of his claim to recover freight, that the goods were injured in the transportation, it follows that his lien must be defeated in the same way. Where the damages sustained are equal to the freight, there can be no difficulty; for, the owner contesting the lien must show facts sufficient to defeat it in the opinion of a court and jury, and on the recovery thus had, the whole matter is ended. If the damages be not equal to or more than the freight, then the plaintiff could only recover for such goods, detained by the carrier, as were more than sufficient to pay his freight.

This matter may, however, be further illustrated. A lien always supposes that something is to be paid for and on account of the goods detained. If nothing in point of fact is due, how can it be pretended that there is a lien? I agree fully with the plaintiff's counsel in the dictum "where there is no debt there is no lien." If it can be shown that the carrier has injured the goods of the plaintiffs, to an amount greater than his whole freight, it cannot be pretended that they owe to him any thing; and hence, the plaintiffs are entitled to maintain this suit.

But let us apply another and a still more simple test. The plaintiff's action is trover: what is necessary to maintain it? Right of property, and of possession, and a conversion by the defendant.

The plaintiff's right of property and possession is clear, upon the payment of the freight due the carrier. If his claim of freight could be defeated by the injury done to the goods, in an action brought by him to recover it, it cannot be said that freight is, in law, due to him. The plaintiffs, having thus right of property and possession, on the proof of conversion their case was made out, and they were entitled to recover.

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These views satisfy me that the nonsuit was improperly ordered; the lien of the carrier is, according to them, made exactly equal to his remedy by action; and this is as far as any remedy by the act of the party is ever allowed to go. It is his own administration of justice, instead of the more tardy mode of attaining the same end by action.

The motion to set aside the nonsuit is granted.

GANTT, EVANS, and BUTLER, Justices, concurred.

EARLE, J. dissenting. From the best consideration which I have been able to bestow on this case, I am still of opinion that, in point of law, the plaintiffs cannot maintain this action, and that the nonsuit was properly ordered. The carrier's lien for freight is too well established to be brought into question, and this entitles him to retain possession of the goods until his freight be paid.—He has a special property in them which, I hold, can only be divested by payment of the freight, or tender of it; and being in actual possession, he is not liable in trover, however else he may be liable, or to whatever extent, for any damages which the goods may have sustained. The first proposition for the plaintiffs, that by the law as well as the usage of trade, damages should be settled in the settlement of freight, derives no support from authority. The case of *Bellamy v. Russell*, 2 Show. 166, cited, is a direct authority the other way, and admits the law and usage of trade to be otherwise, but was decided upon a special custom to detain freight for damage. That the common law of England is otherwise, and that damages even through the default of the carrier cannot be set off against freight, even in actions brought to recover freight, will appear from several cases. *Bornmann v. Tooke*, 1 Camp. Rep., 377, was an action for freight; and when it was proposed to set off the damage suffered by the goods, against the demand for freight, Lord Ellenborough said “the defendant must bring his cross action for any loss he might have suffered from the default of the plaintiff. *Shields v. Davis*, 6 Taun. Rep., 65, was an action of assumpsit for the freight of butter; the casks having been accepted by the defendant from the plaintiff, who was the

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carrier. The defence was that the butter was injured by the negligence of the plaintiff, and that therefore he could recover nothing. The jury found for the plaintiff, and on a motion for a new trial, the argument of Best, Sergeant, was exactly that used here, that the plaintiff's right to freight attached only on the safe delivery of the goods; and if though delivered, they were not safely delivered, he could not recover freight; and, at all events, where the extent of the damage done to the butter was greater than the whole amount that would have been due for the freight, the plaintiff could receive nothing: but the defence was not allowed. Gibbs, Ch. J., said, the plaintiff is liable to a cross action, and Heath, J. added, "here the consignee has accepted the goods, and the principle is, that if he has received any benefit whatever by the carriage, he cannot set up this defence." The principle laid down by Mr. Justice Heath, is fully admitted, and laid down by all the commentators and elementary writers, who agree that freight is earned whenever the goods are delivered and accepted, although in a damaged condition. The carrier, therefore, in this case, was entitled to receive, and had a right of action for, his whole freight; and according to the English cases, the damages could not have been set off, but the freighter must bring his cross action.

The argument on the 2d ground for plaintiffs is, that by our discount law, in case of an action brought for freight, the owner may, under notice, prove that the goods have been damaged beyond the amount due for freight, and on such proof would recover the excess; and this may well be admitted without at all affecting the true grounds on which the defendant in this case stands. He does not bring his action for freight, and therefore there is no room for this discount. He has a special property, and is in possession of the goods, and having earned his freight, which the plaintiffs having accepted a large part of, are estopped from saying he has not earned—he has a right to retain the goods until payment or tender. To hold him liable in trover, upon the bare proposition that the goods are damaged beyond the amount of freight, I speak it with deference, is to repeal the laws of lien for freight, and to introduce a novel principle into the law of trover. To make the

right of property or possession in trover to depend upon the question of a greater or less amount of damages to goods, is to make an issue altogether foreign to that made by the record, and one which a consignee, as in this case, or the owner of the boat himself would never know how to meet. It would seem, on well settled rules of law, that a right to maintain or resist an action, must be absolute and perfect when the action is brought. The rights of the plaintiff at least must always be referred to the time of action brought; yet, in such a case as this, neither the plaintiff nor the defendant can by any possibility know—the one, whether he can sustain his action, or the other, whether he can resist it; but the event of the suit is made to depend on circumstances, of which both, in nine cases out of ten, must be ignorant. The carrier having brought the goods to the place of destination and delivered a large portion, has a certain and ascertained demand, with a legal right to retain so much of the goods as will discharge it. It would seem to be right, and reasonable, and just that this right on his part should protect him against an action of trover, until extinguished by some counter demand equally legal and certain, nor that he should be deprived of his lien and driven to his action for freight, on the mere ground that he had made himself liable to a cross action. The effect of such a decision will be to compel the carrier or his agent in every case where there is any plausible allegation of damages, to abandon his lien and deliver the goods. The argument of avoiding multiplicity of suits has no foundation whatever. The carrier will be driven to his action for the freight and the freighter to his discount for damages, and vice versa. If the freight exceed the damages, the lien, which would have been good, is gone, and the goods disbursed, to the entire loss, perhaps, of the carrier's demand.

If damages to the goods will extinguish the lien for freight, why would not any other right of action which the freighter might acquire against the carrier, if it should exceed the amount due for freight? For, if the question of damage to the goods may be tried on an issue in trover, I see no reason why any other damages, whether by contract or tort, wherein lands or goods are concerned, may not as well be laid. The hardship and unreasonableness of

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the rule about to be established might be further illustrated in its operation upon other classes of liens—those of attorneys, factors, innkeepers, and the like ; for all must be subjected to the application of the same principle, if it be one, that an actual right to property in possession may be extinguished or perfected by incurring a liability for damages. But the great difficulty, which I cannot get over, is, that the plaintiff cannot know whether he has a perfect right of action, nor the defendant, whether he can or ought to resist it ; for neither can know the amount of damages which may be proved, and on that the right of recovery is made to depend. Suppose a case, where the damage proved is exactly equal to the amount of freight, who shall have the verdict ? Suppose the plaintiff proves less damage, does he fail in his action altogether, or entitle himself to an abatement *pro tanto*, from the amount due for freight ? The anomalies of this proceeding are numerous and striking. I think it would be safer and more conformable to precedent and authority to support the lien, and let the freighter bring his action for the damages in proper form.

RICHARDSON, J. concurred with Mr. Justice EARLE.

Petigru and *Lesesne*, for the motion.

M'Crady, contra.

NOTE.—In relation to the principal questions involved in this case, in the discussion and determination of which the court were so seriously divided, it may not be amiss, and the reporter trusts it will not be considered presumptuous in him, to submit some additional references to authorities, and possibly some views which have occurred to him on the subject. It is clear according to the authorities in England, that in an action by the carrier against the shipper or consignee, for freight, where the goods have been delivered and accepted, the defendant cannot set up, by way of defence or set-off to the plaintiff's action, the damage which the goods may have sustained in their transportation, whether that damage be more or less than the freight, or precisely equal to it, and that the freighter must bring his cross action. (See the cases referred to by his Honor, Judge Earle, in his dissenting opinion.) Such a defence is clearly not embraced under the English statutes of set-off. Is it admissible under ours ? The terms of our discount law are very broad, and *would seem, prima facie*, so extensive as to

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embrace any demand or cause of action which the defendant may have against the plaintiff, of whatever character it may be. The material words are, "that in all actions whatever, brought for the recovery of any debt by any plaintiff, &c., it shall and may be lawful for the defendant, *if he have any accompt, reckoning, demand, cause, matter, or thing, against the plaintiff, to give the same in evidence by way of discount, &c.*" It further provides "that judgment shall be entered up for the plaintiff *for the balance only*, and that if the plaintiff be found to be *indebted* to the defendant, judgment shall be entered for the defendant, &c., *provided* the defendant intending to discount *any sum or sums of money, accompts, reckonings, demands, matters, or things, alleged to be due and owing to him from the plaintiff*, do make a copy and deliver the same twelve days before the trial." Do not the words *indebted to the defendant, balance, sum or sums of money, alleged to be due and owing to him from the plaintiff*, evidently apply to monies due to the defendant upon contract, and limit the generality of the other terms employed? Would it be a forced construction to say, taking the whole act together, not only that it applies merely to monies due to the defendant upon contract, but that it is further limited to cases where the amount is *certain* and *liquidated* by the contract, and was never intended to apply to a case of *uncertain* or *unliquidated* damages, although arising upon contract? What, otherwise, are the meaning of the terms *indebted, alleged to be due and owing*, from the plaintiff? The constructions given to our act by some of the earlier cases, would seem to conflict with each other, and there is perhaps no case in which the true construction is definitely settled. In *Cook v. Rhine*, 1 Bay. Rep. 16, Heyward and Grimke, Justices, contrary to the opinion of Bay, J., held that "where damages accrue by non-performance of a contract for building a house within a *certain time*, the defendant might, under our discount law, give them in evidence against the plaintiff's demand for work, labor and services performed in building the house." The argument of counsel there was, on one side, that the discount law only extended to *liquidated* accounts and not to matters *sounding in damages*; and on the other, that the act extended to *any cause, matter or thing, in the defendant's own right, to be set off*.

If the principal case before the court, had been an action by the carrier against the shipper for freight, the analogy between it and the case of *Cook v. Rhine*, would be very marked, and as far as the construction of the discount law is involved, that case may be considered almost identical. In *Gibbes v. Mitchell*, 2 Bay, Rep. 351, in which the true construction of the discount act came up again for consideration, the court, (consisting of Waties, Bay, Johnson, Trezvant and Brevard, say, "that the discount law never meant that *torts, trespasses or any unascertained damages*, should be set off. That it contemplated debts, dues and demands, of a pecuniary nature, or something springing out of a contract where there were mutual covenants, &c., and "that the word *balance* due to the defendant, for which a judgment is directed by the act, if found by the jury, furnished further proof of the intention of the legislature, that *money transactions* only were alluded to in the act."

Although numerous cases involving the right of discount have occurred

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since the above, they have been principally cases of defence by way of discount to actions on bonds or notes given for the purchase money of property, where there has been a partial failure of consideration, or misrepresentation, or fraud in the sale, and the general construction of the statute upon the points discussed, remains, as far as the reported cases go, upon *Cook v. Rhine and Gibbes v. Mitchell*. But assuming either construction of the statute, and that in an action by the carrier for freight, in such a case as the above, the freighter might set up the damage done to the goods as a discount to the plaintiff's action, does it follow necessarily that the freighter under such circumstances can sustain an action of trover for the recovery of a part of the cargo detained by the carrier for freight, without paying or tendering the freight money to him? In virtue of the delivery of the goods, the carrier acquires a special property in them and may maintain an action against any person who displaces that possession, or does any injury to them; and having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner, even if the carriage is dispensed with, unless upon being paid his due remuneration. *Story. Com. on Bailments*, p. 372. The carrier is also entitled to a *lien* on the goods for his hire, and is not compellable to deliver them until he receives it, unless he has entered into some special contract, by which it is waived.—*Ibid*, p. 373. The consignor or shipper is ordinarily bound to the carrier for the hire or freight of the goods; but whenever the consignee engages to pay it, he also may become responsible. It is usual for bills of lading to state that the goods are to be delivered to the consignee or to his assigns, he or they paying freight; in which case, the consignee and his assigns, by accepting the goods, become, by implication, bound to pay the freight. *Ibid*, p. 373, 374.

Now what was the contract in this case on the part of the carrier? It was to deliver the 250 bales of cotton to Boyce & Co. (the consignees,) at Charleston, they paying freight for the same at the rate of one dollar per bale. The agent of the carrier, (the defendant,) delivered 243 bales of the cotton to Boyce & Co. which were accepted by them, and detained the remaining seven bales under his right of lien for the freight. The contract then was to deliver to Boyce & Co. on their paying freight for the same; by accepting the 243 bales, as between the carrier and the consignees, would they not have been estopped from setting up any damage done to the cotton in its transportation, through the fault of the carrier, in bar of the carrier's claim for freight? But above all, could the shipper under this state of facts, claim the possession of the cotton by an action of trover? It does not appear by the statement of the case, that there was a bill of lading, though it is perhaps fairly inferrible that there was one, and that the bill of lading came into the hands of Boyce & Co. the consignees. In this view of the evidence, where was the right of property and of possession? In the plaintiffs, the consignors? or in Boyce & Co. the consignees? even waiving the right of the carrier to retain for freight. It is fair, however, to suppose that the question was agreed to be considered by the counsel in the case, as if the consignees were the plaintiffs in the action, or the present

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plaintiffs as having all the rights of the consignees. In any view of the evidence, it appears that the greater portion of the cotton had been delivered and accepted—and the question results, would an action of trover lie against the carrier, either in favor of the consignors or consignees, while the freight agreed to be paid was unpaid? As to the *consignors*, standing upon their own rights merely, would not the production of the contract itself, between them and the carrier, show that *they* had no right to the possession, while the condition upon which the carrier was to deliver the goods to the consignees, to wit, the payment of freight at a stipulated price per bale, was unperformed? and as to the right of the consignees to sustain trover, does not the same objection apply, strengthened by the fact that they had accepted the greater part of the cotton, and thereby had assented to the terms of the contract and impliedly agreed to pay the stipulated freight.

But it is assumed that if the goods were damaged by the fault of the carrier, to an amount equal to, or more than the freight, no freight was due—and that there was consequently no lien, and that an action of trover would lie against the carrier to recover possession of the goods. Conceding, however, the fact of damage, does it follow that no freight was *due*? All the authorities show that the freight is earned and payable when the goods are delivered; (although in a damaged condition, and that by the fault of the carrier.) In such a case, the shipper, in the *exparte* adjustment of the matter which he is supposed to make of the damages and freight, does not deny that freight is due, but on the contrary allows it, as a precedent charge, and if the damages were less than the freight, would be bound to tender it, and if more, would allow it, as so far reducing his claim for damages. Can it be said that a bond, or note, payable to the plaintiff, is not *due*, because the defendant has a counter claim against him to an equal or greater amount? even though it be one which he may clearly set up by way of discount?—Does not sound policy, as well as the symmetry of the law, require that the freighter should be put to his cross action for damages, rather than allowed to delay or embarrass the prompt payment of freight, by counter claims for damages, or actions of trover for the goods? There might be cases, it is true, where the right to discount the damages against the freight, would be important, as where the carriers were insolvent, or irresponsible, or out of the jurisdiction of the court; but as a general rule, would not that which requires the unconditional payment of the freight on delivery of the goods, and puts the freighter to his cross action for damages, be found most congenial to the interests of commerce, as well as most in harmony with the general principles of the law?

The length of this note, (already extended much further than was intended,) and for which the reporter is perhaps bound to apologise, as throwing no new light on the subject discussed, forbids any further comment upon the important principles involved in this case. Without saying whether his own opinion is very decidedly made up or not, upon the points discussed, (which would be of little importance to mention, if it were,) the consequence of the principles bearing on the case, the well reasoned opinions, both of the majority and minority of the court, excited the interest and attention of the

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reporter and induced him to submit such suggestions and references as he thought might be acceptable to the profession. One thing is certain, however, that the principles recognised by a majority of the court, in this case, are now a part of the law of the land, and have received the highest legal sanction, of which (perhaps) they are capable in this State. R.

DAVID C. MCCLURE v. EDWARD RICHARDSON.

Defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston; and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. One *Howzer* was the master or *patroon* of the boat, and the *general* habit was for those who wished to send their cotton by the defendant's boat, to apply to the defendant *himself*. On this occasion, the patroon had been told to take Col. Goodwin's and Mr. Dallas's cotton, which he had done, when the plaintiff applied to *Howzer*, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant *himself*, to which *Howzer* replied, he thought not and received the cotton: HELD, that under the circumstances, the defendant was bound by the act of *Howzer*, as being within the general scope of the authority conferred upon him by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common carrier, for any loss of, or damage to plaintiff's cotton.

Before BUTLER, J., at Charleston, January Term, 1839.

THE report of his Honor, the presiding Judge, is as follows:—
“This was a special action on the case, to make the defendant liable for cotton lost on board of his boat by fire. The testimony is in writing and can be referred to. One *Howzer* was the patroon of the boat, and took the cotton on board under the following circumstances. He was employed by defendant to take charge of his boat as patroon, and in the early part of the season of 1835, perhaps in October, he had made one trip on the *Santee* to Charleston, with defendant's own cotton: the habit of the defendant being to use his own boat to carry his own cotton, and occasionally, when

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he had not a load of his own, to take his neighbors. On the trip when this cotton was lost, the patroon had been told to take colonel Goodwin's and Mr. Dallas' cotton; he took in Goodwin's at defendant's own landing and Dallas' at Dallas' landing, some distance below, in all 110 bales. At this place the plaintiff, M'Clure, applied to the patroon to take on board 10 bales of his cotton—asking the witness if it was necessary to apply to colonel Richardson himself; the witness replied he supposed it was unnecessary—that colonel Richardson was at his summer place and could not be applied to in time for the boat to go off. The cotton, 10 bales, were taken on board after the boat had passed through the rocky part of the river. At night when the boat stopped, fire was communicated to the cotton by one of the hands striking up a fire on board, contrary to orders; four bales were entirely consumed, two very much injured, and four delivered in Charleston. The cotton of the two that were injured, was put on board of another boat, or perhaps the same boat, and some time afterwards was entirely lost in a gale. The grounds of defence were, that defendant was not liable for the loss, because the patroon was not his agent to take freight, and had no authority to take the cotton without the express orders of his employer. This question depended somewhat on the course of dealing and habits of defendant. Several witnesses were examined, who said that they had often shipped their cotton on defendant's boat, and had paid the usual rates of freight. One witness said he had put cotton on board the defendant's boat in his absence, by making arrangements with his overseer, or patroon of the boat. The general habit was to apply to colonel Richardson himself. Howzer, the patroon on this boat, said he never had before taken cotton without Richardson's consent, but that he thought he was at liberty to do so under the circumstances. In my charge to the jury, I said that masters of marine vessels were regarded as the agents of the owners, to take freight, and that the patroons of boats on our inland rivers were generally in the habit of signing bills of lading. This being the general understanding, I thought the patroon should be regarded as a competent agent, unless the owner had given some public instructions to the contrary, or there were some collusive contract with the patroon by the shipper,

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contrary to the known habits of the owner. That if Howzer were a competent agent to take on board of the boat the cotton in question, which, under the circumstances I thought he was, then the defendant was clearly liable for the loss of the four bales of cotton which were entirely destroyed, he not having brought himself within any of the exceptions that would exempt a common carrier from liability, it having been proved that the plaintiff was to pay for the freight of his cotton. With regard to the two bales that were injured, and lost in a gale, I thought he should be held liable for them too, as the injury that they received in the first instance, resulted from carelessness, unless it could be shown that the ultimate accident, the act of God, would have destroyed the cotton, in spite of the delay occasioned by the fire. In other words, the defendant should be held liable for the free and natural consequences of his carelessness. It is probable, but for the fire, the cotton would have gone in safety to Charleston."

The jury found for the plaintiff the amount of his demand.

Defendant appealed and now moves for a new trial on the following grounds: 1. It is respectfully insisted, his Honor the presiding judge, erred in his charge to the jury, that by the general law, the patroon of a boat navigating the inland waters of the State, has authority to make a contract for carrying goods, and to charge his employer by such contract. 2. Because any inference of such authority derivable from the custom of the river, or the consent of the owner of this boat, having been negatived by all the witnesses in this case, the verdict was contrary to law and evidence.

CURIA, per BUTLER, J. Whether the defendant, Richardson, would have consented that the plaintiff should put his cotton on board of his boat if he had been present, is a matter of conjecture. It is certain his agent, believing in his authority to do so, did take the cotton. The patroon who was in charge of the boat, represented himself as competent to take in freight, and had not the plaintiff every reason to believe that the agent was acting within the scope of his authority? The boat had on board Goodwin's and Dallas' cotton, for which the owner charged them freight. The plaintiff might well have concluded that his cotton would be car-

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ried on the same terms, particularly as defendant had never made any discrimination among his neighbors, but indifferently took their cotton when he wanted freight for his boat. So far as the community were concerned, the patroon (Howzer) occupied the position of any other master of a boat, and might be regarded as the agent of the defendant to take in and sign bills of lading for freight. If the defendant had previously employed his boat for his own purposes exclusively, it could not have been fairly inferred that the agent could do what his employer never had done—but his employer had used his boat in some measure for the community in which he lived, and from his course of dealing with it, had held himself out as a common carrier. He had not in fact imposed any restrictions on the patroons authority to take in freight, and was clearly entitled to charge for all that was taken. If he had chosen to make himself liable alone for such contracts as he himself should make, he should have given some public notice—otherwise how natural was it that others might be deceived—more particularly as his agents before this, according to the testimony of Foyle, were in the habit of taking in freight for him in his absence. His liability arising from the general implication of law, was, that he would be answerable for the acts of his agent, acting within the ordinary scope of such agent's usual authority, unless it were specifically limited and restricted. The authority of an agent results from the position in which he is voluntarily placed by his employer; one should not put an agent in any public employment if he is not willing to be liable for his acts, *bona fide* done in such employment: the right of a master to take in freight, arises from his custody of a boat, which is in the habit of carrying for the community.

The verdict in this case must stand. Motion refused.

GANTT, RICHARDSON, O'NEALL, and EVANS, Justices, concurred.
EARLE, J., dubitante.

Frost, for the motion.

Magrath, contra.

Charleston, February, 1839.

**M. J. FORD, COMMISSIONER IN EQUITY, v. THE ADMINISTRATOR
OF WILLIAM ROUSE.**

A plea of *plene administravit*, if filed without "a full and particular account of the defendant's administration, upon oath, accompanied by an office copy of the inventory and appraisement of the estate," as required by the 6th Rule of Court, (1 Con. Rep., xiv.) is improper, and may be stricken out on motion.

A plea that "due notice was given to creditors to render in their demands against the defendant's intestate, and that in default thereof by the plaintiff, to render an account of his demand, all the goods and chattels of the intestate, which were at the time of his death, and which have ever come into the hands of the defendant as administrator, have been distributed; and that the defendant hath not, nor on the day of the commencement of this suit, or at any time since, hath or had any of the goods or chattels of the intestate, but the same are fully administered," &c. is only another variety of the plea of *plene administravit*, and is equally objectionable with that plea, if filed without the account, inventory, &c. required by the 6th Rule of Court.

Such a plea is also objectionable, as pleading a matter *specially*, which could properly be put in issue under the plea of *plene administravit*, by the plaintiff's replication and the defendant's rejoinder.

Such a plea as the above, (independently of these objections) is no answer to the plaintiff's declaration. The plaintiff seeks to recover *now* his debt out of the assets of the intestate. The only answer for the want of assets is *plene administravit*, generally, or *præter*. This is neither the one or the other in a legal point of view, and cannot be allowed as a bar to the plaintiff's demand.

The object of the 27th sec. of the act of 1789, P. L. 494, which provides "that every executor or administrator shall give three weeks' notice, by advertisement, for creditors to render an account of their demands; and that they shall be allowed twelve months to ascertain the debts due to and from the deceased; and as to creditors neglecting to give in a statement of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same, &c." is to protect an executor or administrator from a *personal* liability for the debt not rendered in.— If there still remain an abundance of assets, in the hands of the executor or administrator, it would be no objection to the plaintiff's recovery, that the executor or administrator had given the legal notice, and that the plaintiff had failed to give a state of his debt. The plaintiff would still be entitled to a judgment *de bonis testatoris*.

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The only four cases, *it seems*, where an executor or administrator would be estopped from denying assets, are 1st, where he confesses judgment; 2d, where he suffers judgment by default; 3d, where he pleads *plene administravit*, and 4th, where he pleads *plene administravit* generally, or *præter*, and his plea has been traversed, and the jury find a sum *ultra* in his hands.

In this state, a *devastavit* can only be established against an executor or administrator, 1st, by establishing the testator's debt by matter of record (i. e. a judgment recovered against the executor or administrator *de bonis testatoris*); 2d, assets admitted by the defendant's *plea*, confession, or default, or found by the verdict of a jury, on and against the plea of *plene administravit* generally, or *præter*; and 3d, that the defendant has wasted such assets. The only other mode of reaching an administrator *personally*, is by an account before the ordinary, or in equity, preparatory to a suit on his bond.

A plea by the defendant, an administrator, of a decree in equity, in a case to which the plaintiff was no party, is a plea of *res inter alios acta*, and no bar of the plaintiff's right of action.

Before O'NEALL, J., at Charleston, Spring Term, 1837.

THE report of his honor, the presiding judge, is as follows:—
 “This was an action of debt on bond. The defendant pleaded *non est factum*, on which issue was joined, *plene administravit*, but filed no account therewith, and two special pleas in bar: 1st, that due notice was given to creditors of the deceased to render in their demands; and 2d, a bill by the distributees against the defendant and such creditors as were known, and a decree of the court of equity, directing a payment over of the funds in his hands. The plea of *plene administravit* was ordered to be stricken out, for want of an account of the defendant's administration. To the two special pleas there was a demurrer, which I sustained. As to the first, it is no answer to the plaintiff's case. To say that the creditors were notified to bring in their demands, is not showing any cause why the plaintiff should not be paid. If connected with notice, there had been full administration by paying debts of inferior degree, then indeed the plaintiff could not have recovered; but to make this defence, the plea of *plene administravit*, with an account of the defendant's administration, was the proper plea. The defendant's second plea, if of any sort of avail,

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was a mere variation of *plene administravit præter*, and without the account of the defendant's administration could not be noticed. As a plea of a recovery in equity, it could not bind this plaintiff, unless he had been party thereto, which it did not pretend. The plaintiff proved his case under the plea of *non est factum*, and had a verdict."

The defendant appealed, and now moves to reverse the judgment below, on the demurrer in this case, upon the ground, that the several pleas filed were sufficient in law to bar the recovery of the plaintiff, and judgment should have been rendered accordingly.

CURIA, per O'NEALL, J. In relation to the defendant's plea of *plene administravit*, it is only necessary to apply the 6th rule of court, and it cannot be received: (Rules adopted in 1814, 1 Con. Rep. Mill. xiv.) The language of the rule is—"No plea of *plene administravit* shall be admitted in any action against executors or administrators, unless the defendant pleading such plea do file with the same, in the clerk's office, a full and particular account of his administration, upon oath, with an office copy of the inventory and appraisement of the estate; to the end that it may appear to the court, that the personal assets of the testator or intestate are really administered to the extent pleaded by the defendant."—Without "the full and particular account of the defendant's administration upon oath, accompanied by an office copy of the inventory and appraisement of the estate," the defendant's plea was improperly filed; and when this objection was presented to the court, to strike out the defendant's plea was the only course which the court could pursue, if the rule of the court was to be enforced. The first special plea, "that due notice was given to creditors, to render in their true demands against the defendant's intestate, and that in default thereof by the said plaintiff, to render in an account of his demand, all the goods and chattels of the said William Rouse, deceased, which were at the time of his death, and which have ever come into the hands of the said William T., as administrator as aforesaid, have been distributed; and that the said William T. hath not, nor on the day of the commencement of this suit, or at any time since, hath or had any of the goods or

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chattels of the said William Rouse, deceased, but the same are fully administered," &c. is, in fact, but another variety of *plene administravit*, and is subject to the objection already stated to that plea. This is indeed pleading a matter specially, which could properly be put in issue under *plene administravit*, by the plaintiff's replication and the defendant's rejoinder. For, if that plea had been accompanied by defendant's accounts, the plaintiff might have replied the payment of debts out of their legal order, and averred that his debt was entitled to priority of payment. To this the defendant would have rejoined, that he gave the due notice for creditors to render in an account of their demands, and that the plaintiff failed to do so. This is the regular course of special pleading, and when a defendant reverses it by pleading his rejoinder, it is so untechnical that a *lawyer* would hardly expect to make much progress by it. But, to give him an advantage, by so doing, can never be allowed. He cannot thus be permitted to get rid of what is so distinctly required by the rule of court, *the filing with the plea an account on oath of his administration*. But, as a plea, it is no answer to the plaintiff's declaration; he seeks to recover now his debt of the assets of the intestate. The only answer for the want of assets, is *plene administravit*, generally, or *præter*. This is neither one or the other, in a legal point of view, and cannot be allowed as a bar to the plaintiff's demand. The 27th section of the act of 1789, (P. L. 494,) provides "every executor or administrator shall give three weeks' notice, by advertisement in the State Gazette, or, at three different places of the most public resort in the parish or county, for creditors to render an account of their demands; and they shall be allowed twelve months to ascertain the debts due to and from the deceased, to be computed from the probate of the will, or granting letters of administration. And creditors neglecting to give in a state of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same, nor shall any action be commenced against executors or administrators for the recovery of the debts due by the testator or intestate, until nine months after such testator's or intestate's death." The object of this provision, in relation to notice

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to creditors is, to protect an executor or administrator from a personal liability for the debt not rendered in. If there still remains an abundance of assets in the hands of the executor or administrator, it would be no objection to the plaintiff's recovery to say, "you had the legal notice, but failed to give me a state of your debt;" for, the executor or administrator would not be called on to make the same good.

So here the defendant has failed to plead *plene administravit* properly, and must be regarded as in possession of assets sufficient to pay the plaintiff's demand. If, however, this is regarded as being rather technical, in visiting upon a defendant the consequences of mispleading, let us ask the question, is the defendant now in fact or in law, sought to be made liable personally for the plaintiff's debt? I think not. The *judgment* which will be recovered is *de bonis testatoris*. In an action of debt on this recovery, suggesting a *devastavit*, then the issue will be, shall this defendant make this plaintiff's debt good. If the pleading here would preclude this question, then perhaps we might hesitate about closing the only door by which the defendant might escape. But the pleading left upon record under the circuit decision, will be *non est factum* merely. The only four cases where an executor or administrator would be estopped from denying assets are, 1. Where he confesses judgment. 2. Where he suffers judgment by default. 3. Where he pleads *plene administravit*; and 4. Where he pleads *plene administravit* generally or *præter* and his plea has been traversed, and the jury find a sum *ultra* in his hands.* In Bacon's Abridgment, title Executors and Administrators, letter M., fig. 1, it is said, "But if an executor pleads that such a deed is not the deed of his testator, or that a release was given by the testator, though these prove false, yet the judgment shall be *de bonis testatoris*, for of these the executor cannot be supposed to have so perfect a knowledge." In *Brown v. Hillegas et ux.*, 2 Hill. 450, it is said, "An executor or administrator is not to be made liable *de bonis propriis*, until his *devastavit* is legally and formally establish-

* See *Givens v. Porteous*, 1 M'Cord. 379; *Brown v. Hillegas et ux.*, 2 Hill. 447.

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ed. In this State, this can only be done by establishing first, his testator's debt by matter of record, (i. e. a judgment recovered against the executor or administrator de bonis testatoris). Second, assets admitted by the defendant's plea, confession or default, or found by the verdict of a jury on and against the plea of plene administravit, generally or præter; and third, that the defendant has wasted such assets." Under these rules, it is plain that the defendant is not in any danger of a personal liability in an action of debt suggesting a devastavit. The only other mode of reaching him personally is by an account before the Ordinary, or in Equity, preparatory to a suit on his bond. There the matter of this plea will be properly and rightfully examined, and if it be true, as is alleged, the defendant will have the benefit of it. The defendant's other plea is of a decree in equity, in a case to which this plaintiff was no party. As to him it is *res inter alios acta*, and according to a principle of law as old as its administration, cannot bar his right of action, and is therefore no defence to be pleaded by the defendant.

The motion to reverse the circuit decision is therefore dismissed.

EVANS, BUTLER, RICHARDSON and EARLE, Justices, concurred.

Hunt, for the motion.

Memminger, contra.

C. G. CAPERS v. JAMES FRIPP.

Action on the case for obstructing a right of way. In 1835, the plaintiff had recovered by verdict and judgment, a right of way in the general course of the private road claimed in this action. The complaint was, that the defendant had dug a ditch and thrown up a bank which obstructed the way. The recovery referred to did not describe the way, except by finding the "river road" for the plaintiff. One witness for the plaintiff deposed "that

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the road had been for about thirty years, along the bluff of the river.— That after the recovery (spoken of), the witness, together with *Chaplin* and *Adams*, placed a line of stakes thirty feet from the river bank, (intended for the river side of the road,) and allowed eighteen or twenty feet outside the stakes for the road. They meant to lay out a sufficient way as the river successively washes the bluff and encroaches on the road. That there were two places where the old track ran outside the stakes, and there were spots where the bluff had encroached upon the old track; as it washes fast, they allowed some space for its washing. That it had not washed much since the stakes were put down. That since the stakes were put down a ditch had been dug and dam made, (no doubt) by the defendant. The ditch runs about eighteen feet from the bluff, and in one part (where there is a wash) about twelve feet only. This ditch cuts a small part of the *old track* off the road, but there the space is wide. The ditch runs sometimes within his line of stakes and at others out of it.”

The defence set up was that after the recovery, the defendant allowed at least twenty feet from the bluff for the plaintiff's way, and that he had cut the ditch to keep the road within that space. That if it had been diminished by the river, the plaintiff had to bear the loss, on the ground that a private road must be repaired by the owner. One *John Edwards*, on the part of the defendant, deposed, “that after *James Fripp*, *Chaplin* and *Adams*, had put down their stakes, he cut the ditch, &c., for the defendant in December, 1836. That the ditch left twenty-six or twenty-seven feet space for the road, but that it had been lessened in breadth by washing. That it was now thirteen feet at the wash and was safe enough. He did not think the ditch encroached upon the old track or stakes. Another witness stated “that the ditch encroached upon the old track, (as it stood before the recovery by the plaintiff,) but still leaves that spot wide; that the river washed away the narrow spot (the wash) more than a foot last year, and that the bluff had neared the ditch about two feet since it was dug.”

Upon this evidence the Judge below instructed the jury, “that by the former recovery, the plaintiff was entitled to a certain *specific way* and no more. That it was not a *shifting way*, nor a road claimed from necessity. That the difficulty was to perceive what particular way he had recovered. There were no marked lines, stations, points, or corners, by which the court could lay down a rule for locating the precise line or route of the road, only the *river road*. But that from the recovery, the plaintiff had clearly a right of way along the river, which it did not appear had been washed off. If it had, then the plaintiff might have claimed some way or other, but that at present they had nothing to do with such a question. That if the defendant had adopted the route laid out by *James Fripp*, or the plaintiff the line ditched by *John Edwards*, the way might have been plain. That as the case stood, if the defendant had obstructed the old road actually recovered, he must pay damages for the obstruction; if he had not, the verdict must be for him; whether the river had encroached upon the old track or not, did not affect the question. That he who used

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the way, must repair it or bear the inconvenience—and he who obstructed it must pay damages.” The jury found a verdict for the plaintiff for \$200 damages, and the court refused to grant a new trial.

Before RICHARDSON, J., at Coosawhatchie, Nov. Term, 1838.

HIS honor, the presiding judge, before whom this case was tried, makes the following report: “This was an action on the case for obstructing the plaintiff’s right of way along the bluff of St. Helena River, over the lands of the defendant. In 1835, the plaintiff recovered a right of way in the general course of the private road, claimed in this action. (See the record and verdict in *Capers v. Fripp*.) The complaint was that the defendant had dug a ditch and thrown up a bank, which obstructed the way. The recovery did not describe the way, except by finding the “River Road,” for the plaintiff.

John Fripp deposed, that the road had been, for about thirty years, along the bluff of the river. That after the recovery, the witness, Chaplin and Adams placed a line of stakes thirty feet from the river bank, (intended for the river side of the road,) and allowed eighteen or twenty feet outside the stakes for the road. They meant to lay out a sufficient way, as the river successively washes the bluff, and encroaches on the road. There were two places where the old track ran outside the stakes, and there were spots where the bluff had encroached upon the old track; as it washes fast, they allowed some space for its washing. But it has not washed much since the stakes were put down. Since the stakes were put down, a ditch has been dug and a dam made, (no doubt by defendant.) The ditch runs about eighteen feet from the bluff, and in one part, where there is a wash, about twelve feet only. This ditch cuts a small part of the old track of the road, but there the space is wide. The ditch runs sometimes within his line of stakes, and at others out of it.

The defence set up was, that after the recovery, the defendant allowed at least twenty feet from the bluff for the plaintiff’s way, and cut the ditch to keep the road within that space. That if it had been diminished by the river, the plaintiff had to bear the loss. A private road must be repaired by the owner.

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On the part of the defendant, John Edwards stated, that after James Fripp, Chaplin and Adams had put down their stakes, witness cut the ditch, &c. for the defendant, in December, 1836; that the ditch left twenty-six or twenty-seven feet space for the road, but it had lessened in breadth by washing. That it was now thirteen feet at the wash, and was safe enough. He did not think the ditch encroached upon the old track or stakes. The evidence of both this witness and the last may be required more in detail.

Benj. Capers stated, that the ditch encroached upon the old track, (as it stood before the recovery by plaintiff,) but still leaves that spot wide; the river washed away the narrow spot, (the wash,) more than a foot last year, and the bluff had neared the ditch about two feet, since it was dug.

I charged, that by the former recovery, the plaintiff was entitled to a certain specific way, and no more. That it was not a shifting way, nor a road claimed from necessity. The difficulty was, to perceive what particular way he had recovered. There were no marked lines, stations, points or corners, by which the court could lay down a rule for locating the precise line or route of the road, only the river road. But from the recovery, the plaintiff had clearly a right of way along the river, which it did not appear had been yet washed off. If it had, then the plaintiff might have claimed some way or other; but at present we had nothing to do with such a question. If the defendant had adopted the route laid out by James Fripp, or the plaintiff the line ditched by John Edwards, the way might have been plain. As the case stood, if the defendant had obstructed the old road actually recovered, he must pay damages for the obstruction. If he had not, the verdict must be for him; whether the river had encroached upon the old track or not, did not affect the true question. He who used the way must repair it, or bear the inconvenience; and he who obstructed it must pay damages." The jury returned a verdict of two hundred dollars.

The defendant appealed, and now moves for a new trial on the following grounds: 1. Because the evidence established that the ditch dug by the defendant in December, 1836, did leave a good

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and sufficient way at that time, between it and the edge of the bank, a bluff in its whole length—and the jury ought to have been instructed to find for the defendant, if they believed that its intersection of the river road in the one point, spoken of by the witnesses, was occasioned solely by the plaintiff's own encroachment on that side, *after* it was dug.

2. Because, the road staked off by Messrs. Fripp, Adams and Chaplin, commissioners, was an entirely new road, and the defendant not only had the right to obstruct it, but he had not the right to surrender the land of his intestate, included within the limits of the proposed road ; and the jury ought to have been directed not to take into consideration the said obstruction, and if the plaintiff had proved no other, to find for the defendant.

3. Because, the river road, the only road to which the plaintiff was entitled, was sufficiently designated and described by the witnesses ; what ought to be the extent and location of that road, was not a question for the jury, but only whether the road as described and located by all the witnesses, had been obstructed by the ditch in 1836, or before the commencement of the suit.

4. Because, the jury ought to have been instructed to find for the defendant, if they believed that any insufficiency in the river road was occasioned by the breaking in of the bank of the river, and the neglect of the said C. G. Capers to repair them—and that the difficulty of repairing and keeping in repair the said banks, if any existed, was not a question for their consideration.

5. Because, there was no evidence of any obstruction of the river road by the defendant, before the commencement of the action ; and no evidence to warrant the jury in giving any damages at all, much less vindictive damages.

6. Because the jury ought to have been instructed that the verdict in the case between these parties in the year 1835, only established the plaintiff's right to the river road, as it then existed, and nothing more ; and that there was no evidence that he was entitled to a sufficient way over the land of defendant's intestate, except in that road.

7. Because, the verdict is contrary to law and evidence, and the charge of the presiding judge.

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CURIA, per RICHARDSON, J. The court considers the charge of the presiding judge correct and sufficient, according to the essential facts of the case, and the verdict satisfactory; but avoids giving any opinion upon questions not essential to the particular case and the verdict for the plaintiff.

The motion is dismissed.

GANTT, EVANS, O'NEALL, and EARLE, Justices, concurred.

De Treville, for the motion.

Rhett, contra.

CAROLINE CHARTRAN v. J. W. SCHMIDT.

Under the trover act of 1827, it is not essential that the affidavit required by that act should be made by the *plaintiff*. The affidavit of a *third person* is equally competent; and in the case of a free person of color plaintiff, is proper and sufficient.

Before BUTLER, J., at Charleston, January Term, 1839.

THE plaintiff (a free colored woman,) brought her action of trover, for negroes, under the act of 1827, against the defendant. On the affidavit of a third person, the defendant was under order of the clerk of court, compelled to give bond and security. His counsel moved Judge Bay, at chambers, to set aside the order, which was granted.

The plaintiff now, upon her own affidavit and that of a third person, moves the court to have security from the defendant, and other matters, in these words, viz: 1st. That the defendant in the above instituted cause be required to enter into bond and security,

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for the production of the specific chattels sued for, in case the plaintiff recover. 2d. If this order be granted, that the plaintiff be allowed, upon entering into bond with security, to file the declaration and docket the cause for hearing. 3. But if the first order be not granted, then this plaintiff, in the present condition of the cause, be allowed to file the declaration and docket the cause, the clerk having refused so to do, on the first day of the term, on the ground that the plaintiff had not entered into bond with security, as required by the act; to all of which the defendant objected, and the court granted the motions.

The defendant appealed from the decision of his honor, the presiding judge, and now moved to reverse the same, on the following grounds: 1. That the plaintiff being a colored woman cannot make an affidavit affecting the rights of a free white man, as in the present case. 2. That the affidavit ought to have been made at the commencement of the suit, and it is now too late. 3. That an action of trover, commenced under the statute of 1827, cannot be changed into a common action of trover; but that if it fails to be supported under that act, a new suit must be commenced. 4. That the granting of the motions of the plaintiff is against law.

CURIA, per EARLE, J. The plaintiff, a free colored woman, brought trover for negroes, under the act of 1827; and, on the affidavit of a third person, procured an order from the clerk, requiring the defendant to enter into bond with security, according to the provisions of the act. This was set aside by his honor, Mr. Justice Bay, at chambers, and the plaintiff moves to reverse the decision.

It would be a very harsh construction of the act of 1827, which was intended to provide so ample a remedy, for a mischief so severely and extensively felt, if we should hold that no affidavit shall be sufficient to authorise the order for security that is not made by the plaintiff himself; a construction so literal and strict does not conform to the rules by which remedial statutes are usually interpreted; nor does it derive any countenance from precedent or analogy. I apprehend no instance can be cited, (certainly none was cited,) at the bar, when the affidavit of a party

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is required, that the affidavit of a third person will not be equally competent, if the fact be of such a nature that a third person can be supposed to know it, so as to depose with sufficient certainty. The case of bail, in civil actions generally, is entirely analogous; and no sensible reason can be imagined why the affidavit of a third person shall be sufficient in ordinary bail, that will not equally apply to the security required in trover by the act of 1827. Bail, in trover, might have been ordered before, under the act of 1769, on the affidavit of a third person, that the chattel sued for belonged to the plaintiff, and had been converted by the defendant; and it would be very strange if the legislature could have intended to impose harder terms on the plaintiff, for the purpose of securing the production of the chattel, than would be required to secure the body of the defendant, to satisfy the judgment. The language of the act, it is true, is "upon affidavit made by any plaintiff." But the supposed disability of the plaintiff herself to make an affidavit, puts her in no worse condition than that of any other plaintiff would be, on the construction claimed by the defendant, who should happen to be absent from the country, or who might not be sufficiently informed, either of his title or of the conversion, to make the affidavit himself. All such plaintiffs would be excluded from the benefits of the act, which would thus fail to provide a remedy co-extensive with the mischief. The rule of court requires the affidavit of a party who moves to continue a cause; yet it is every day's practice to admit, for the purpose, of the affidavit of third persons. The argument that the plaintiff cannot delegate authority to an agent, to do that which she cannot do herself, is merely specious. If not a case of agency, the oath is not taken by virtue of a power of attorney. If this were true, the attorney might lawfully do whatever the plaintiff could do, and a plaintiff might appoint a free negro, a felon or convict, to make an affidavit for him. The person making the affidavit swears from his own knowledge, and not from the information of the plaintiff. It would be gross injustice to allow a free person of color to bring an action, and withhold the means of making it effectual. The judgment of his honor, Mr. Justice Bay, vacating the order for security granted by the clerk, on

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issuing the writ, is set aside, and the said order returned to its original effect.

GANTT, O'NEALL, EVANS, RICHARDSON, and BUTLER, Justices, concurred.

King and Walker, for the defendant.

Simons, for the plaintiff.

JESSE SMITH v. JOHN W. SMITH.

Trespass to try title. It was admitted on both sides that the title was perfect in *Jesse Smith*, deceased, in his life time—who was the father of both plaintiff and defendant, and under whom both claimed. The plaintiff to make out his title, relied on the proceedings at law for the partition of the real estate of Jesse Smith among his heirs, an order for the sale of the lands, and an actual sale by the sheriff of the tract in dispute, at which he became the purchaser, and produced the sheriff's deed reciting the return of the commissioners, the order and the sale, dated 4th September, 1835. The original summons and writ in partition, and proceedings, were not produced, and on proof of their existence and loss, the plaintiff offered as *secondary evidence* the following entries in the sheriff's books and abstracts from the daily minutes of the court, corroborated by the testimony of the officers of the court and other witnesses: 1. Entry in the sheriff's books, 30th January, 1828, "J. Patterson and wife v. the heirs at law of Jesse Smith, summons in partition." The plaintiff and defendant were both parties, and were both served. Summons returned to the clerk. (The clerk deposed that he had made diligent search for these proceedings in partition, without having found them.) 2. In the minutes of the court for April term, 1828, an entry relative to the same matter, "on the return of the summons in partition, ordered that a writ of partition do issue, directed to certain commissioners and that they make their return to the next court," (at the ensuing November term, there was no court.) 3. At April term, 1829, the following entry, "J. Patterson and wife, and others, v. Jesse Smith, adm'r., ordered that a writ of partition do issue," appointing Benjamin Gause and others commissioners, who were not entirely the same persons named before. (Mr. Holt, the attorney, deposed that there were

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two motions and orders for writs of partition relating to the same land, but that there was only one summons.) 4. At Spring term, 1831, an order for extending the writ to make return. The following final order was made at Fall term, 1831, "John Patterson and wife v. Mercy Smith et al. The commissioners having made their return recommending a sale of the premises, ordered that the same be confirmed, and that the sheriff do sell the premises," &c. (specifying the time and terms.) It was further proved by a witness present, that the land was sold and bid off by the plaintiff; and by *Todd*, one of the commissioners, that they went upon the land, were at the defendant's house, that he claimed the part he lived on as a gift from his father. That the commissioners valued the land and recommended a sale, including that portion claimed by the defendant, and that he, the witness, *returned* the proceedings to the clerk's office. Held competent and sufficient evidence of title in the plaintiff.

It may be questioned whether it was necessary for the plaintiff to produce in this case more than the final order of the court, on the coming in of the commissioners return, for the sale of the premises.

Although the proceedings for partition are to be regarded to all intents and purposes as *a suit*, yet under the act giving jurisdiction at law and the practice upon it, the plaintiffs or claimants are not required to *declare* unless the defendant appear and resists the partition. In that case an issue becomes necessary, and the plaintiff must declare.

In this case the defendant having been served with the *summons*, had an opportunity of setting up his title and making defence; he was called upon to shew cause why the partition should not be made of the premises as the estate of *Jesse Smith*, deceased. It was a suit involving his title to the land, and he cannot *now* be allowed to make the defence which he omitted to make then. The order for the sale is conclusive as the judgment of a court upon the same subject matter and between the same parties. His defence should have been made before the writ of partition was ordered to issue.

Where in proceedings in partition, an apparent chasm of two years appeared to exist between the order directing the writ to issue and an order allowing further time to the commissioners to make their return, the court would not consider it as affecting the validity of the *judgment*; whether the order for the writ of partition to issue, or the final order for the sale of the premises, on the commissioners return, were to be regarded as the judgment. In either case, the final order confirming the return and ordering the sale, would be considered as curing any apparent irregularity in the previous proceedings.

Before EARLE, J., at Horry, Fall Term, 1838.

THIS was an action of trespass to try titles. The following is the report of his Honor the presiding Judge: "It was admitted

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on both sides that the title was perfect in Jesse Smith, deceased, in his life time, who was the father of both the plaintiff and the defendant, and under whom both claimed. The plaintiff relied on the proceedings at law for partition of the real estate of Jesse Smith among his heirs, an order for the sale of the lands, and an actual sale by the sheriff of the tract in dispute, at which he became the purchaser, and produced the sheriff's deed reciting the return of the commissioners, the order and the sale, dated 4th Sept'r., 1835. The original summons and writ in partition, and proceedings, were not produced, and the plaintiff relied on secondary evidence, after proof of their existence and loss, and this consisted of the following entries in the sheriff's books and abstracts from the daily minutes of the court, corroborated by the testimony of the officers of the court and other witnesses. 1. Entry, 30th Jan. 1828, in the sheriff's book, proved by the then sheriff, "J. Patterson and wife v. the heirs at law of Jesse Smith, summons in partition." The plaintiff and defendant were both parties and were both served—summons returned to the clerk—the clerk deposed that he had made diligent search for these proceedings in partition without having found them. 2. In the minutes of the court for April term, 1828, an entry relative to the same matter, "on the return of the summons in partition, ordered that a writ of partition do issue directed to certain commissioners, and that they make their return to the next court. At the ensuing November term there was no court. 3. At April Term, 1829, the following entry, "J. Patterson and wife, and others, v. Jesse Smith, adm'r., ordered that a writ of partition do issue, appointing Benjamin Gause, J. G. Cochran, John Thomas, William Todd and John W. Durant, commissioners, &c., not entirely the same persons named before. Mr. Holt, the attorney, deposed that there were two motions and orders for writs of partition relating to the same lands, but that there was only one summons. 4. At Spring term, 1831, an order for extending the time to make return. The following final order was made at Fall term, 1831, "John Patterson and wife v. Mercy Smith et al., the commissioners having made their return recommending a sale of the premises, ordered that the same be confirmed, and that the sheriff do sell the premises on," &c. (specifying the time and terms.)

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It was proved by a witness present that the land was sold and bid off by the plaintiff; and by Todd, one of the commissioners, that they went upon the land, were at the defendant's house, that he claimed the part he lived on as a gift from his father, that the commissioners valued the land and recommended a sale, including that portion claimed by the defendant, and that he (the witness) returned the proceedings to the clerk's office.

On a motion for a nonsuit, I held that the proceedings in partition were proved by competent evidence to let in the sheriff's deed to plaintiff, and overruled the motion. The defendant then set up title in himself by possession to the land in dispute and offered the following evidence: The tract was originally granted for 600 acres, lying on Brick Creek Swamp. Only a portion of it was claimed by the defendant, and the main objection to his recovery was the want of proof as to the extent of his claim on the boundaries of the land alleged to have been given. The proof was ample that the defendant entered by permission of the father on his marriage, or soon after, and has continued in possession twenty-five years; directly after he settled there his father was heard to say he had given him the place. He then lived at another place on the same tract, and died in 1826. So that the defendant must have been in possession twelve years before his father's death. Two plats were used in evidence, principally one made by Hemingway, in 1815, which divides the tract in three parts; why, was not fully explained. Smith, the father, had on the marriage of several others of his children, settled them on land, without conveyance, which none of them subsequently claimed. There was no evidence to connect the defendant's possession, or the alleged gift of the father, in reference to boundary and interest with the part called the Malcolm tract, in which he lives, unless it be the testimony of Stanahand, (in writing,) who said that the defendant's father related to him that his son, (the defendant,) had wished to remove upon the Timothy tract, (see the plat,) but had changed his mind and wished to remain on the Malcolm tract, adding, "he is now on the Malcolm tract and I intend he shall have it." It did not sufficiently appear when this occurred. The plat could not have been made until several years after the marriage of the defendant,

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and after he entered on the land. The proof of an actual gift was rebutted to some extent, by proof of a declaration of the father, that he *intended* the land for his son, but had never given him the scrape of a pen, and a declaration of the defendant himself, when asked if he intended to allow the commissioners to value the land, he replied, "he did not know what else to do, as he had no better title than the rest of them." The only witness who proved the declaration by the father of an actual gift, was one Chalker, who heard him say immediately after the marriage, "that he had given him the place," but he did not know the number of acres nor the boundaries.

I thought the proof was ample that the defendant was regularly a party to the proceedings in the partition, that it was a suit involving his title to the land, that he assented to the valuation by the commissioners, that he acquiesced in the judgment of the court ordering the sale, and therefore thought he should be concluded from setting up an adverse title against the purchaser at sale. The question of gift or no gift, was submitted to the jury. On the supposition that the defendant was not made a party to the proceedings, admitting that there was an actual gift of the part occupied, a proof of possession under permission, which would constitute good title; yet the evidence was insufficient as to the boundaries to allow the defendant to recover. The jury was charged accordingly and they found for the plaintiff. As there was proof of an actual possession of eighteen acres of upland and six of swamp, cleared and cultivated, if the circuit was in error on the first ground, perhaps the defendant might have recovered to the extent of his inclosures."

The defendant appealed and now renewed his motion for a nonsuit on the following grounds: 1. That there were no proceedings under the first writ of partition, adduced by plaintiff, and that it did not appear from the minutes of the court that defendant was ever made a party to the second writ of partition. 2. That the proceedings in partition was defective, by the lapse of two years, between the second and third order for the extension of time for the return of the writ. 3. That there was no evidence adduced of a judgment having been entered up.

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Also, for a new trial on the following grounds: 1. That his honor erred in charging the jury, that if the defendant, was informed of the proceedings in partition and did not come in and object to their confirmation, he was concluded from afterwards setting up title against the title of the plaintiff, who was a purchaser at the sale. 2. That there was no sufficient evidence of the defendant's having had legal notice of the proceedings in partition. 3. That there was sufficient evidence of title by possession in defendant, previous to the death of Jesse Smith, sen'r.

CURIA, per EARLE, J. The plaintiff derives title immediately from the sheriff, under a sale made by order of the Court of Common Pleas for Horry, upon proceedings in partition, to which both the plaintiff and defendant were parties. The original summons, the writ and the return of the commissioners, were not produced; but on proof of a diligent search having been made in the public offices, where they should have been deposited, and the well founded belief of those who had charge of the offices, that they were lost or destroyed, the entries in the sheriff's books and the minutes of the court, were allowed to show that such proceedings had been had, that the summons had issued and been served, and that on its return and no cause shown to the contrary, a writ of partition had also been issued, directed to commissioners in the usual form. Supposing it necessary to go back beyond the order for the sale of the land upon the return of the commissioners, it is the opinion of the court that the evidence admitted was competent and sufficient. In *Cook et al. v. Wood*, 1 M'Cord. 139, slighter evidence, though of the same kind, as the title of the cause and an entry of the judge on an old docket, an old subpoena writ endorsed as of the same cause, were admitted to prove that the plaintiff's ancestor had formerly brought an action for the same land, which abated by the death of the plaintiff, so as to prevent the operation of the stat. of limitations in favor of the defendant. But it may be well questioned, whether it was necessary to produce more than the final order of the court, on the coming in of the commissioners return, for the sale of the premises. In England, the proceedings in partition, in cases where they are allowed at law, are as regular

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and as formal as in any other suit ; the summons, the declaration, the plea, the writ to the sheriff and the final judgment. Here there is less formality, and although it is to be regarded to all intents and purposes as a suit, yet under the act giving jurisdiction at law, and the practice upon it, the plaintiffs or claimants are not required to declare, unless the defendants appear and resist the partition. In that case an issue becomes necessary, and the plaintiff must declare. The defendant here, when served with the summons, had the opportunity of setting up his title and making his full defence. He was called upon to show cause why the partition should not be made of the premises, as the estate of Jesse Smith, deceased. It was a suit involving his title to the land, and he cannot be allowed to make now the defence which he omitted to make then. The order for the sale is conclusive, as the judgment of a court upon the same subject matter and between the same parties. His defence should have been made before the writ of partition was ordered to issue ; after that it was too late to plead, although I would not say, that under extraordinary circumstances, the court might not permit him to controvert the right. On the return of the commissioners, having been made a party in interest by service of process, it is a legal presumption that he had notice of all the subsequent proceedings, and supposing the chasm of two years to exist between the order directing the writ to issue, and the order allowing further time for the commissioners to make their return, it cannot have the effect of avoiding the judgment, whether we regard the order for the writ of partition to issue as the judgment, or the final order for the sale of the premises on the commissioners return. In either case, I should consider the final order confirming the return and ordering the sale, as curing any apparent irregularity in the previous proceedings. It is the act of the court itself, not of its ministerial officer, (as the renewing of an execution,) and must therefore be presumed to have been regular and legal. In this case, as in other cases, where the plaintiff claims under a sheriff's deed it is only necessary to prove that the sheriff had authority to sell: a judgment is necessary to authorise a sale of land. In this case the order for the sale is the authority, and so long as the proceedings remain of force, can no more be avoided in this collateral

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way than a formal judgment, regularly entered up and signed, could be avoided by showing that during the progress of the cause, there was a period of more than a year and a day, during which it was not on the docket at all, or was not preserved by regular continuances. If the order for the writ to issue be considered the judgment, as I think it should be, then the subsequent proceedings were only to carry it into execution, and regular continuances were not necessary. The order of April term, 1831, extending the time for making the return, could not have been made without cause shown and notice to the parties, and must be allowed to have the same effect, which I have already said the final order of sale would have, of curing the previous irregularity, (even if continuances were necessary.) To allow judgments, or other proceedings of courts having the force and effect of judgments, thus to be averred against and avoided, would unsettle every thing, and would be a violation of all principle and a departure from all precedent. The proceedings in partition being proved by competent evidence, and being also found sufficiently regular, form a bar to the claim of title now set up by the defendant. The other objections to the plaintiff's recovery need not be considered.

The motion to set aside the verdict, and for a new trial, is dismissed.

GANTT, RICHARDSON, EVANS and BUTLER, Justices, concurred.

Munro, for the motion.

MARY DUGGAN, ADM'X. v. JOHN KING, Sen.

Action against an indorser—question of diligence. The note was drawn by one Pohl and wife, dated 12th February, 1838, payable at three months after date, to the defendant or order, and by him indorsed. It fell due on

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the 12th, and *payable* on the 15th of May. The testimony was that the plaintiff, the holder of the note, resided at *Montgomery*, Alabama, both at the date of the note and up to the time it was payable. That one *George Timmons* acted as her agent in the city of Charleston, where the note was given, and where the drawers and indorser also resided.—The note was taken by *Timmons*, for the rent of a house in Charleston, belonging to the estate of *Duggan*. *Timmons* was taken sick a little more than a month before the note became due, and died on the 11th of May. The papers of the estate of *Duggan* were kept by *Timmons*, in his desk at the *Union Bank*, in which he was collection clerk and notary, and were delivered to one *O. L. Dobson*, (who was acting for Mrs. *Timmons*, executrix of *Timmons*), by the officers of the bank, on the 8th of June. There was no knowledge that the note was there, until the 8th of June, either by Mrs. *Timmons* or *Dobson*. *Dobson* was a notary public : he immediately made a demand on the drawers, and the note not being paid, protested it, and gave notice of non-payment to the defendant as indorser. HELD, under the circumstances, that due diligence had been used, and that the defendant was liable.

Quære : Whether the question of reasonable diligence, in making demand and giving notice, in the case of bills and notes, be one of law for the court, arising upon the facts ascertained, or a mixed question of law and fact, to be left under the instruction of the court as to the law, exclusively to the jury?

THIS case came up on an appeal from the City Court of Charleston. It was tried before his honor, Jacob Axson, Esq. the Recorder, at the November Term of the City Court, 1838.—His report of the case is as follows :

“ This was a summary process against defendant, as indorser of a note drawn by Pohl and wife, dated 12th of February, 1838, payable three months after date ; it was due on the 12th, and payable on the 15th of May.

O. L. Dobson, sworn, testified that he knows Mrs. Duggan, the plaintiff. She resided in Montgomery, Alabama, both at the time of the date of note and the time it was payable. George Timmons acted as her agent in this city : the note was taken by Timmons for the rent of the house in St. Michael's Alley, belonging to the estate of Duggan. Timmons was taken sick a little more than a month before the note became due ; he died on the 11th of May. The papers of the estate of Duggan were kept by Timmons, in his desk at the Union Bank, in which he was col-

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lection clerk and notary; and were delivered to witness, who was acting for Mrs. Timmons, executrix of Timmons, by the officers of the bank, on the 8th of June. There was no knowledge that the note was there, until the 8th June, either by Mrs. Timmons or the witness: witness is a notary public; he immediately protested the note, made a demand on the drawer, and gave defendant notice.

I thought, under the circumstances, that due diligence was used, and decreed for the plaintiff."

The defendant appealed from the decision below, and now moved for a new trial on the part of the defendant, on the following grounds: 1. That *due* notice was not given to the defendant as indorser, that the drawers had not paid. 2. That, in fact, no notice whatever was given the defendant till long after the note was at maturity.

CURIA, per EARLE, J. That the holder of a promissory note should demand payment of the maker, or use due diligence to make such demand, and give reasonable notice of non-payment, in order to charge the indorser, are propositions well enough understood. But in the application of these rules to cases as they arise, there has been less uniformity than one would expect, on a subject of such general concern, and of such frequent occurrence. What shall be deemed due diligence in making a demand, and reasonable notice of non-payment, are questions which even yet give rise to debate, and sometimes result in different conclusions. Nor is it well settled whether they are properly questions of law for the court, or of fact for the jury; or partly questions of law, and partly questions of fact. In *Tindal v. Brown*, 1 Term. Rep. 167, it was said by Lord Mansfield, (Buller J. concurring,) that they are questions partly of fact and partly of law, depending on the situation of the parties; their distance from each other; the course of the post and other circumstances: but whether on a given state of facts the time is reasonable, is a question of law on which the jury should receive the instructions of the court. And that whenever a rule can be laid down, it should be decided by the court, and adhered to, for the sake of certainty. In that case,

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after two verdicts for the plaintiff, which were set aside, the jury found a special verdict on which the postea was delivered to the plaintiff. In *Muilman v. D'Eguino*, 2 H. B. 565, in 1795, both Ch. J. Eyre and Buller, J. seemed to regard the question of diligence as one for the jury. The Chief Justice said, "I am satisfied with the finding of the jury;" the question whether there had been any laches was left to them, which it was proper for them to decide, and Buller, Justice, said, "The only rule that I know of, which can be applied to all cases of bills of exchange, is, that due diligence must be used: that is the only thing to be looked at; whether the bill be inland or foreign, or payable at sight, or days after, or in any other manner; and as the jury had found that there were laches in the plaintiffs, he was satisfied with the verdict." In *Hilton v. Shepard*, 6 East. Rep. 12, in note, (in 1796,) Lord Kenyon, on a rule to set aside the verdict for plaintiff, found before himself, on the ground that he had left it to the jury to say whether, under all the circumstances, the plaintiff had been guilty of any laches or negligence, said, "I cannot conceive how this can be matter of law. I can understand that the law should require due diligence; but that it should be laid down that the notice must be given that day, or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived that, whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances, of accident, necessity and the like;" but added, that when the case went down to trial again, he should advise the jury to find a special verdict, by which it would still be made a question of law. He expressed a similar doubt in *Hopes v. Alder*, in 1800, 6 East. Rep. 16, in notes. "He did not see the sense of the rule in *Tindal v. Brown*; whether reasonable notice have or have not been given, must depend on the circumstances of the case of which the jury will judge." This point was much considered in *Darbishire v. Parker*, in 1805, 6 East. 2, where Ld. Ellenborough admitted the difficulty in laying down any certain time, within which notice must at all events be given, and thought that a proper case to be considered by another jury. A verdict having been found for the plaintiff, under

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his instructions, regarding the question of reasonable notice as one compounded of law and fact, he had left it to the jury. The other judges seemed rather to regard it as a question of law, and the rule for a new trial was made absolute. Le Blanc, J. said—“It is unnecessary to determine the general question; but whenever that shall arise, the court will have to consider whether reasonable notice be a question of fact or of law. In *Tindal v. Brown*, and in *Metcalf v. Hall*, it was considered a question of law, but dependant on facts. If the general rule be, that the holder is to send notice by the next post, and he fail to do so, it is for him to show an excuse for the omission; as, that he lived too far from the post-office, or that the post departed again too soon, or that he was unavoidably engaged in other business, which prevented him from writing by the next post; and then the jury will have to consider the validity of such excuse, in point of fact, for his non-compliance with the rule of law. I think this is the true view of the subject, whether the question of demand and reasonable notice be questions of fact or law, or partly of both. It is certain that the verdicts of juries, and the determinations of courts, have established some general rules, as that the holder of a note or bill must demand payment of the maker or acceptor, when it becomes payable, and must give notice to the party intended to be charged, the next day, where the parties live in the same town, or by the next post, if at different places. It is obvious, therefore, that in the case before the court, the demand of payment was not made in due time of the maker, and that due notice of non-payment was not given to the defendant. The rules in relation to presentment for acceptance and for payment are the same, as well as those relating to the notice which may be necessary in either case, and if they have not been complied with, it is for the plaintiff to show a valid excuse for the omission.

The note was payable on the 15th of May, and Timmons died on the 11th. The note being locked up in his desk at the bank, was not delivered until the 8th of June, when the demand was made and notice given. His honor, the recorder, thought that no laches could be imputed to the plaintiff, and gave judgment for her. The defendant might have claimed a jury, and submitted

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the question to them ; not having done so, the case is the same as if the jury had found a verdict for the plaintiff, on the same facts, under proper instructions, and we were called on to set aside the judgment as against law. In the opinion of the court, the case would have been a very proper one for the jury ; and that there is no sufficient reason to be dissatisfied with the judgment of the recorder. If we were to consider the question here as one of law, to be decided by the court, as on a special verdict, we should come to the same conclusion. Timmons, the agent of the plaintiff, who resided in a distant state, became sick and died, four days before the note became payable. Had the note been discovered, or been actually in the hands of his widow and executrix, she was under no obligation, and had no authority to make the demand, or give the notice. The agency of her husband was a personal trust, which did not pass to the executrix, and there is no ground for imputing negligence, unless we hold that Timmons, in the moment of his last illness, should have had the foresight to place the note in the hands of a notary. But a protest was not necessary, and any other person engaged to make the demand would have done as well. Under such circumstances, would Timmons have been liable even to the plaintiff, or would his executrix have been, for not taking steps beforehand, while lying at the point of death, to have the demand made and notice given ? I should think not ; and I do not therefore perceive how the plaintiff can have laches imputed to her, when she was several hundred miles distant, and not only ignorant of the facts, but could not by the ordinary course of the mail, have been informed of them earlier than the notice was actually given. It is one of those cases of accident, of unforeseen calamity, which may well come within the maxim, *actus dei nemine facit injuriam* ; and which Lord Kenyon, in *Hilton v. Shepard*, thought was very proper to be left to the jury to consider.

The political state of the country, at the place and time of a bill's becoming due—as, a declaration of war—which rendered it impossible to present it for acceptance, was held a valid excuse for the omission, it being afterwards presented as soon as practicable : 2 Smith's Rep. 223 ; Chitty on Bills, 319. And in New-

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York, the prevalence of the yellow fever in the city where the parties lived, was held a sufficient excuse for not giving notice of non-payment, from September until November, there being a total cessation of all business; 2 John. Cases, 1.

The judgment of the recorder is affirmed.

GANTT, O'NEALL, BUTLER and RICHARDSON, Justices, concurred.

Lance, for the motion.

Yeadon and *M'Beth*, contra.

NOTE.—See the case of Haslett v. Kunhardt, ante, 189, and the authorities there referred to. R.

A. P. SMITH v. BENJAMIN R. BYTHEWOOD.

On a note payable on demand, the maker is bound to pay immediately, and is not entitled to days of grace. The holder may sue on the same day the note is made. Any other demand than by suit is unnecessary.

Whenever the plaintiff may sue the defendant, a cause of action may be said to *have accrued* to him, and from that time the statute of limitations begins to run; consequently, upon a note payable on demand, the statute commences from the date, if it have one, and if without date, from its *delivery*.

Before O'NEALL, J., at Beaufort, Spring Term, 1838.

THE following is the report of his honor the presiding judge:—
“This was an action of assumpsit on a due bill, without date, payable on demand to J. J. Beck, or bearer. The defence was the statute of limitations. The due bill was passed by Beck, the payee, to the plaintiff, for a sum less than its amount, and upon an understanding that if it could not be collected from the defendant, he

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would indemnify the plaintiff. From the proof, I thought that the due bill was made anterior to the year 1831. This suit was brought in 1837. It was proved that the plaintiff said, that Beck told him the note was out of date. The note was presented by the plaintiff for payment, which was refused, a few days before the action was brought. I thought, and so charged the jury, that upon such a paper as the present, no cause of action existed until there was a demand of payment. Being without date, there could not be said to be a present indebtedness. The whole liability of the defendant to pay, depended upon the demand of payment: until that was done, the plaintiff's cause of action was neither "given nor accrued," and hence the statute could not in this case bar the plaintiff's action."

The jury found for the plaintiff.

The defendant appealed on the annexed grounds: 1. Because his honor charged the jury, that the maker of a promissory note payable to A. B., or bearer, on demand, and without date, cannot avail himself of the statute of limitations in a suit by the original payee, although the time of the making of the note be distinctly proved by testimony aliunde. 2. Because notice of the time of the making of the note was given to the plaintiff before he received the note from the original payee, and that fact, with the other circumstances of the case, entitled the defendant to a verdict. 3. Because the note having been made before the year 1831, and the suit not commenced until the beginning of the year 1837, and no evidence of a promise since 1831—the defendant was protected by the statute of limitations. 4. Because the verdict was contrary to law and evidence.

CURIA, per EVANS, J. In relation to notes payable on demand, it is well settled, the maker is bound to pay immediately, he is not even entitled to days of grace. The holder may sue on the same day the note is made. A demand by his writ is sufficient. Whenever the plaintiff may sue the defendant, a cause of action has accrued to him, and from that time the statute of limitations begins to run. The case is not like that of sheriffs and other agents, who are not in default until they refuse to pay the money, and conse-

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quently the statute does not begin to run until after demand. But it is unnecessary to discuss this question, as it is conceded to be the settled law both of England and of this State, that the statute of limitations commences to run from the date of a note, payable on demand. This was decided by the Appeal Court at Columbia, a few years ago, in a case, the name of which I have been unable to ascertain. It was contended in this case, that as this note is without date, it should be governed by a different rule. I do not perceive any reason for this distinction. A note, like a deed, is nothing until it is delivered. Its legal efficacy as a contract, commences with delivery, and the maker is bound to pay immediately. It follows from this, that if no action be brought within four years after the note has been delivered, the statute of limitations is a bar to the action. The motion for a new trial is therefore granted.

GANTT and BUTLER, Justices, concurred. EARLE, J., absent at the hearing, but concurred in the judgment.

De Treville, for the motion.

Martin, contra.

NOTE.—A note payable on demand is not entitled to days of grace, but an action may be immediately brought without any other demand being made. Cammer ads. Harrison, 2 M'Cord. Rep. 246.

Where a promise is made to pay a debt, *indefinitely as to time*, the statute of limitations begins to run from the time of the promise.—Admrs. of McDowall v. Ex'ors. of Goodwyn, 2 M. Con. Rep. 441.

If a promissory note be made payable *upon demand*, it seems that no express demand is necessary; and consequently that the limitation commences from the date of the note.—Chitty on Cont. 636. S. P., 4. Pick. 488. 7 Har. & John, 14. 1 Har. & Gill. 439. R.

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M'MILLAN & EWART v. THE UNION INSURANCE COMPANY.

Where the master fails to employ a *pilot* to navigate a vessel in coming into or leaving a port, where it is customary to do so, (as the port of Charleston,) and a loss happens in consequence of a pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured through the dangers, to avoid which a pilot is usually employed, and the loss happens at a point beyond which the pilot's services cease to be necessary, the assured would be entitled to recover.

It is an error to consider the employment of a pilot, in coming into or leaving a particular port, as a part of the seaworthiness of the vessel; nothing can enter into that which is not for the whole voyage. The business of a *pilot* is merely *temporary*. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally. Under such circumstances, it would be an abuse of terms to say, that a competent pilot was necessary to make a vessel *seaworthy*. The true principle seems to be, that if a vessel, without a pilot, sustain injury in entering or leaving a harbor where it is customary to have a pilot, such injury does not come within the perils insured against. *It is not a peril of the sea.*—It is a loss from the bad navigation of the vessel, and is to be set down to the fault of the *master*, and consequently the *owners* would be liable and not the *underwriters*. [Per O'NEALL, J.]

Before O'NEALL, J., at Charleston, May Term, 1837.

THE following is the report of his honor the presiding judge:—
“ This was an action on a policy of insurance, to recover the value of sixty-two bales and three hundred and seventy-eight pieces of cotton bagging, shipped by the plaintiffs from Charleston to Mobile, on the schooner *Minerva*, of Thomastown, Thorndyke, master, which vessel, cargo, and all her crew and passengers were lost in the gale of the 28th and 29th of October, 1835. The vessel was staunch and well found. On the 28th of October, when about to sail, the master applied for and obtained twenty dollars to pay the pilotage. He spoke to a pilot to accompany him beyond the bar; the forepart of the day, however, wore away, the vessel had

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not sailed, and the weather becoming more threatening, the pilot refused to go. The wind was blowing strong from the N. E., as it had been for some days; and all the pilots, and several others examined, agreed in saying that it was very imprudent to go to sea in such weather: indeed, they said, they would not carry out a vessel in such weather. Others, however, said that they had seen vessels go to sea in weather fully as bad: the master's view of the matter when about to sail, was, that as the gale had prevailed already for several days, it was pretty well over, and by sailing then he should have for some hours the tail of the gale to help on towards his port of destination, and if he waited for it to subside, he should probably be detained some time in port, before he could obtain a favorable wind. He sailed between twelve and one, when the tide was flood, and when the wind had diminished, *without a pilot*. His vessel drew eight and a half feet of water, according to his own account; but being only partially loaded, Mr. Cohen, the merchant who cleared her out, said he did not think she drew more than six and a half to seven and a half feet. When the captain came in to Charleston, *he came in without a pilot*. The wind was fair to cross the bar by the *Overall* channel, through which the *Minerva* went to sea. To run through on a straight course, a vessel would cross the *dry breaker*, on which the water is eight feet. Mr. Elford, the keeper of the Observatory, proved that the *Minerva* crossed the bar, and stood out to sea, east. He said when he last observed her, she must have been from five to ten miles beyond the bar. The pilots Lee, Newboldt, Chapman and Davidson, saw the *Minerva* going out; they all said it *was barely possible she might have gone clear: they all thought she must have struck*. Mr. Lee said he saw her in the channel and afterwards beyond the bar. The *Minerva* was found sunk, by Capt. Baker, off Port Royal, in nine fathoms water, ten or fifteen miles from land; the time when so found was uncertain, it was, however, most probably within a few days after her loss. From her situation when found, which he and his mate described, Capt. Baker, his mate, Mr. Cross, Capt. Callender and Mr. M'Nellage, all agreed in saying that she was probably not injured in crossing the bar: and that she had been capsized in the gale. The pilots Lee and Chapman, also met

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with the wreck: and according to their proof, the wreck was within fifteen miles of the Charleston light. The night after the *Minerva* sailed, the wind changed to S. and S. E. and blew a hurricane that night and the succeeding day. Capt. Thorndyke, from the knowledge had of him during the short time he was in Charleston, appeared to be an intelligent, sober, and active seaman. The custom of the port that vessels coming in or going out should have a pilot, was fully proved: so was the necessity of such a custom. It did, however, appear, that vessels occasionally came in and went out without pilots. I instructed the jury, that generally, *insurance* extended to all perils which would not charge the ship-owners: where they were liable, the underwriters were generally not; as in cases of unseaworthiness of the ship, or a voluntary deviation from the voyage, not amounting to barratry on the part of the master or crew. Barratry may be defined to be any fraudulent act of the master or mariners, by which the subject matter insured might be endangered. In this case, the only act which had the semblance of barratry was, that the master received the pilotage and sailed without a pilot; but that, I thought, was not attributable to fraud; the master spoke to a pilot and intended to have availed himself of his services. The pilot's refusal to go was the cause of his sailing without one. I said to the jury that the ship was the substratum on which the insurance rested; and unless her value, if she was insured and lost, could be recovered, it was seldom if ever the case, that the underwriters would be liable for goods shipped on board of her and insured. It was hence a first inquiry, in a case like the present, to ascertain the seaworthiness of the vessel, which I defined to be the *capability under ordinary circumstances of performing the voyage before her*. I said to them, that "in navigating a river, or approaching, or leaving a harbor where it is *customary* for vessels of the burthen and description of that insured, to take a pilot, the vessel is not seaworthy unless she have such pilot."—*Law v. Hollingsworth*, 7 T. R. 156. I instructed the jury to inquire, 1st, is it the custom of the port of Charleston that a pilot should be employed in approaching or leaving the harbor. The proof was clear as to the existence, necessity and reasonableness of the custom. 2d. What was the effect on the policy

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of failing to employ a pilot? I thought and so instructed the jury, that if a loss happened in consequence of a pilot not being employed that the underwriters would be discharged; but if the vessel passed uninjured through the dangers, to avoid which a pilot was usually employed, and the loss happened beyond the point at which a pilot's services ceases to be necessary, that the assured would be entitled to recover. In 1804, in the case of *Depeau v. Jones*, it was held by the Constitutional Court, that inasmuch as a pilot was not employed in bringing in a vessel to the port of Charleston, and she struck upon the bar and a part of her cargo was injured, that the underwriters were discharged. So in *Law v. Hollingsworth*, a vessel ascending the Thames, discharged her pilot and soon after was injured, it was held that the assured could not recover. In that case Lord Kenyon put his judgment upon the fact, that no "*pilot was on board at the time the accident happened.*" I thought this case would depend upon an answer to the question in fact, whether the vessel struck in crossing the bar? If she did not and went clear, and was subsequently capsized in the gale, the assured would be entitled to recover, otherwise not. I summed up (as fairly as I was able) the evidence, and submitted it to the jury. They found for the plaintiffs—and I think their verdict was correct and proper."

The defendants now moved for a nonsuit, or new trial, (as the case may be,) on the following grounds: 1. That in all contracts between the insurer and the insured, there is on the part of the insured, an implied warranty of seaworthiness; and in the present case the vessel in question was proved to have been unseaworthy for want of a pilot, and the underwriters, defendants, were discharged from their liability on the policy of insurance. 2. That the testimony in the case proved that the vessel struck going over the bar, and her loss was clearly attributable to this cause. 3. That the cause why the vessel in question and her cargo were lost, was the want of a pilot to conduct her over the bar. 4. That the verdict was against the law of the case in this, that the vessel and cargo should be presumed to have perished for want of a pilot, and there was no fact in evidence to rebut that presumption. 5. Because the risk was increased and the loss produced by the

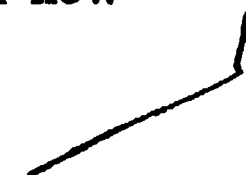
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default of the assured, or their agents, in the sailing without a pilot, and therefore the underwriters are discharged. 6. Because the usage of the port, and the *lex loci*, imposed upon the assured the duty of taking a pilot, and they having neglected this duty, the underwriters are discharged. 7. Because the verdict was otherwise against law and evidence.

CURIA, per O'NEALL, J. The facts of this case have been passed upon by a jury, and they have found that the *Minerva* was uninjured in crossing the bar of the harbour of Charleston, and that she was subsequently capsized in the gale. That there were many facts justifying this conclusion, cannot be denied. It was my own opinion formed at the trial, but withheld as much as possible from the jury. Under such circumstances, it would, according to our settled rules, be in vain to talk about a new trial on the facts. The only question which remains is, whether the fact of sailing from a harbor, where it is customary to take a pilot, without one, discharged the underwriters? The cases cited in the report, show very fully that if the vessel had been lost, in consequence of any injury received in that part of a voyage in which a pilot was necessary, that then the insurers would have been discharged. But the finding of the jury negatives the assumption that the *Minerva* was lost in crossing the bar of the harbour of Charleston, and ascribes her loss to the perils of the sea, outside of the bar. On the trial, and in my report, I fell into the error so common in the elementary works, of making the employment of a pilot a part of the sea-worthiness of the vessel; nothing can enter into *that*, which is not for the whole voyage. The business of a pilot is merely temporary. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally; under such circumstances, it would be an abuse of terms to say, that a competent pilot was necessary to make a vessel sea-worthy. The true notion seems to me to be this: if a vessel without a pilot sustain injury in entering or leaving a harbor where it is customary to have a pilot; that then such injury does not come within the perils insured against. It is not a peril of the sea; it is a loss from the bad navigation of the

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vessel, and is to be set down to the fault of the master, and consequently the owners would be liable for it. The general rule is, if the owners would not be liable for the loss, that then the insurers are. Let us suppose a case, and it will perhaps furnish a just test for this. If the goods on board the *Minerva* had not been insured, and this action was against the owners, and the jury had found, specially, that the *Minerva* sailed without a pilot, from the harbor of Charleston, when it was customary and proper to employ one, but crossed the bar in safety, and was subsequently capsized in the ocean, in the gale of the 28th and 29th of October, to whom must the *postea* have been delivered? Unquestionably to the defendants; for the loss would have been from the act of God. Does not this answer show at once the liability of the insurers? They undertook and warranted against the very peril from which the loss arises, and yet they would be excused by matter which had no effect in producing it. This would be to submit the facts of the case, and with them its justice, to give effect to a legal definition made by elementary writers, from cases in which the loss arises from the non-employment of a pilot, in a case in which it happened from another cause. In the case of *Law v. Hollingsworth*, 7 T. R. 156, from which Phillips extracts the principle "that in navigating a river, or approaching or leaving a harbor, where it is customary for vessels of the burthen and description of that insured to take a pilot, the vessel is not seaworthy unless she have such a pilot," the injury was sustained in ascending the Thames, at a point where a pilot should have been on board; and in that case Lord Kenyon put his judgment expressly on the ground that "no pilot was on board at the time the accident happened." That case shows that instead of the discharge of the underwriters being ascribed to sea-worthiness, it is set down expressly to the want of a skilful navigation at the place where the accident occurred. The same remark may be made of the cases of *Depeau v. Jones*, 1 Brev. R. 437, and *Stanwood v. Rich*. I think, therefore, after great consideration, that in law and fact the verdict is right, and that the motion for new trial ought to be dismissed; and it is so ordered.



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EVANS, EARLE, and BUTLER, Justices, concurred.

Hunt and *Memminger*, for the motion.

Petigru, contra.

NOTE.—The reader is referred to the following additional authorities, as to what constitutes *sea-worthiness*, and as to the employment or non-employment of pilots, as establishing principles perhaps analogous to those laid down by the court in the preceding case; or, at all events, as illustrating the general doctrine involved in it.

Every ship must, at the commencement of the voyage insured, possess all the qualities of *sea-worthiness*, and be navigated by a competent master and crew.—*M'Lanahan v. The Universal Ins. Co.* 1 Peters, 183.

Sea-worthiness in port, or while lying in the offing, may be one thing, and sea-worthiness for the whole voyage, quite another.—*ibid.*

What is a competent crew for the voyage—at what time such crew should be on board—what is the proper *pilot* ground—what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage; are questions of fact, dependent upon nautical testimony, and exclusively within the province of the jury.
ibid.

Though want of sea-worthiness, at the time the risk commenced, may not vacate the policy, provided the vessel is sea-worthy at the time the voyage commences; yet the vessel cannot go out of her course to supply such want. As, if at the time the risk commences, the vessel is not sufficiently manned, she may afterwards, and before the voyage commences, supply that want; yet she cannot excuse a deviation for the purpose of procuring hands.—*Cruder v. The Philad. Ins. Co.*, 2 Wash. C. C. R. 339.

A cargo was insured at and from North-Carolina to New-York; HELD, that if the vessel was sea-worthy when she passed the boundary line of North-Carolina, this was sufficient; and her unseaworthiness previous to that point of time would be no defence in an action against the underwriters for a loss.—*Treadwell v. Union Ins. Co.*, 6 Cowen, 270.

Sea-worthiness is an implied warranty in a policy of insurance; it relates, however, only to the commencement of the risk. If it be then broken, the insurer is discharged from liability; but a breach of this warranty after the commencement of the risk does not discharge the insurer from loss subsequently happening, unless such loss be the consequence of unseaworthiness.—*Am. Ins. Co. v. Ogden*, 15 Wend., 532.

A ship may be sea-worthy in harbor in a state which would not be sufficient for a voyage; therefore on a policy at and from the port at which the ship was undergoing repairs at the time of insurance, HELD, that although not sea-worthy for a voyage, she was sufficiently so in harbor, and that there

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was no breach of the implied warranty.—*Forbes v. Wilson*, and *Hibbert v. Martin*, 1 Park. Ins., 344.; 1 Camp., 538.

The question whether a ship on a voyage from Madras to London is not sea-worthy if she have no person on board her besides the captain, who is capable of navigating her, is a *question of fact* for the jury, and not a question of law to be determined by the judge.—*Clifford v. Hunter*, M. & M., 103; 3 C. & P. 16.

As a full complement of men is not necessary in harbor, a ship does not cease to be sea-worthy for want of a crew till she sails on the voyage without a crew.—*Annen v. Woodman*, 3 Taunt. 299.

The vessel arrived off Sierra Leone about 3 o'clock in the afternoon; the captain hoisted signals for a *pilot*, and none having come off by 10, he attempted to enter the harbor without one, and the vessel was lost. HELD, that the captain being a person of competent skill, the underwriters were liable for the loss sustained; such an exercise of discretion comes within the principles applied to other losses incurred by the error of the master or captain.—2 B. & A. 73; 5 B. & A. 171. *Phillips v. Headlam*, 2 B. & A. 380; Am. Jurist, vol. ix. 106.

Quere, whether the loss in the principal case may not be considered, after all, as having arisen from the *fault of the master*, in putting out to sea in such threatening and tempestuous weather as the evidence represents it to have been at the time? (See the testimony.) In *Mars. on Ins.*, vol. 1, 215, it is said "that upon principles of natural justice the insurer can in no case make himself answerable for any loss or damage proceeding directly from the fault of the insured." In *Abbott on Shipping*, p. 265, in treating of the duties of the masters and owners of ships, it is said of the master, "*He must on no account sail out during tempestuous weather;*" citing *Molloy* and *Roccus* to the same effect. R.

CASES AT LAW,
 ARGUED AND DETERMINED IN
THE COURT OF APPEALS
 OF
SOUTH-CAROLINA,
 AT
COLUMBIA, MAY, 1839.

JUDGES PRESENT:

Hon. JOHN S. RICHARDSON,
 Hon. JOHN B. O'NEALL,
 Hon. JOSIAH J. EVANS,
 Hon. BAYLIS J. EARLE,
 Hon. A. P. BUTLER.

His honor, Mr. Justice GANTT, was absent during this Term,
 holding the Spring Circuit for Charleston.

THE STATE v. WM. BRAZIL, WM. GRIFFIN, JAS. M'ECHERIN, et al.
THE SAME v. WM. BRAZIL, ELI BEACH, et al.
THE SAME v. L. B. BOWIE, HUGH MILLER, J. M'ECHERIN, et al.

Indictments for Riot—motion in arrest of judgment. The indictments charged in substance, "that the defendants unlawfully, riotously, and routously assembled together to disturb the peace of the State, and being so assembled, did make great noise, riot, tumult and disturbance, for a long space of time, to the great terror and disturbance of the people," &c. HELD conformable to the precedents in such cases, and sufficient. Motion refused.

Where an indictment for a riot charged that the two defendants, who were named, with divers other persons, *to the jurors unknown*, to the number of ten did assemble, &c., HELD sufficient to sustain a verdict of

The State v. Brazil et al.

guilty against the two defendants, who were tried and convicted. It is not necessary to allege that a *riot* was committed by *three* persons *named* in the indictment. It is sufficient to name those who are known, and to allege that the others were *unknown*.

On an indictment for a *riot* conformable to the usual precedents, after a general verdict of guilty, it is, it seems, wholly immaterial whether the facts proved establish that the defendants are guilty of a *riot*, *rout*, or *unlawful assembly*. They are kindred offences, and the greater includes the less. A general verdict of guilty, therefore, on an indictment for a riot will be supported, although the evidence establishes no more than an *unlawful assembly*.

Where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols, or both, and marched backwards and forwards through the streets, shooting guns and blowing horns, to the terror and alarm of the inhabitants, HELD, that the perpetrators were guilty of a *riot*, and a motion for a new trial refused.

One of the persons indicted, though not proved to have been seen in the midst of the party, was seen coming from where they were assembled, in a state of intoxication, with a pistol in each hand, and spoke of himself as the head of the mob; HELD, sufficient evidence to sustain a verdict of guilty against him.

Before EVANS, J., at Fairfield, Spring Term, 1839.

THE report of his honor the presiding judge, of these cases, is as follows: "These were three indictments for riot. The first ground in the notice applies to all the cases. It was satisfactorily proved, that on three nights in the month of August last, a band of men, eight or ten, disguised, paraded through the streets of Winnsborough, armed with guns or pistols, or both—they marched backwards and forwards, shooting guns or pistols and blowing horns, from 9 o'clock, P. M., until after midnight—that in several instances, persons, and especially females, were aroused from their sleep in a state of terror and alarm, by the firing of the guns in the streets, near to their houses. I was of opinion, and so charged the jury, that this was a riot. All the defendants were seen in the midst of these companies, except Miller, who was one of the persons charged in the case last above stated. The proof in relation to him was, that on the night of the last riot, he was seen passing

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through the streets, intoxicated, with a pistol in each hand, snapping them. He was coming in a direction which led to the place where the party was assembled, and a few days after he told a witness that he was the colonel of the dog-tail dragoons, which was the name that these parties designated themselves by. The jury found him guilty with the rest, and I thought the evidence warranted their finding."

The defendants now moved in arrest of judgment, and for a new trial, on the following grounds: For a new trial—1. Because from the facts established by the evidence, the offence in law, is not a riot, and the court should have so charged the jury. 2. Because the jury in the last above case erred in finding Miller guilty in the absence of any proof of concert, combination, or participation with the supposed rioters. 3. And in arrest of judgment in all the three above cases, there being no definite offence laid in the indictments; and in the second case, because only two persons are named and one found guilty.

CURIA, per EVANS, J. All the indictments in these cases, are in the common form to be found in Chitty and the books of precedents. They charge in substance, that the defendants unlawfully, riotously and routously, assembled together to disturb the peace of the State, and being so assembled, did make great noise, riot, tumult and disturbance, for a long space of time, to the great terror and disturbance of the people, &c. All the essential ingredients of a riot are here charged, and the motion in arrest of judgment on this ground cannot prevail. In the second case stated above, against Brazil and Beach, the indictment charges that the defendants, with divers other persons, to the jurors unknown, to the number of ten, did assemble, &c. According to all the authorities, it is not necessary to allege that the riot was committed by three persons named in the indictment. It is sufficient to name those who are known and to allege that the others were unknown. These cases are wholly unlike the case of O'Donnell, 1 M'Cord. 532, which was relied on in the argument. In that case, the indictment charged that O'Donnell, with two other persons, committed the riot. The grand jury found the bill against two only,

and there was no allegation that other persons unknown were concerned with him.

The first ground for a new trial is, that the facts proved do not amount to riot, or any legal offence. On this ground I would remark, that it is wholly immaterial whether the facts proved establish that the defendants are guilty of a riot, a rout, or unlawful assembly. They are kindred offences, and the greater includes the less. Every battery includes an assault, and every riot includes a rout and unlawful assembly. A general verdict of guilty on an indictment for assault and battery will be sustained, although the evidence establish only an assault. So also I apprehend a verdict of guilty on an indictment for riot will be supported, although the evidence establishes no more than an unlawful assembly. But do the facts proved amount to a riot? Hawkins says a riot is a tumultuous disturbance of the peace by three persons or more, assembled of their own authority, with intent, mutually, to assist each other, and afterwards putting the design in execution in a terrific and violent manner, whether the object be lawful or unlawful. This partakes of the imperfections of all definitions, and a correct idea of the offence is only to be obtained by analysing the cases which have been decided. All the authorities agree that if the act committed be a trespass, it is unlawful and riotous, as if the object be to beat another, or to pull down his house, or such like acts.—But a man may lawfully pull down his own house in a tumultuous manner and with a great concourse of people, yet if it be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot—so also if a dozen men assemble together in a forest and blow horns, or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight, in the streets of Charleston, or Columbia, and were to march through the streets crying fire, blowing horns and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot, although there might be no ordinance of the city for punishing such conduct. And why? Because such conduct in such a place is calculated to excite terror and alarm among the citizens. Lord Holt says, 10 Mod. 116, if a number of men assemble with arms, in *terrorem populi*, although no act be done, it is a

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riot. On the same principle, an indictment was sustained for riotously kicking a foot ball in the town of Kingston, 2 Chitty. Cr. 494. It was an amusement, but accompanied with such circumstances of noise and tumult, as were calculated to excite terror and alarm among the inhabitants of the town. Parker, Ch. J., says in Runnel's case, 10 Mass. R. 518, "if the offence consists in going about armed, without committing any act, the words 'in terrorem populi,' are necessary—because the offence consists in terrifying the people. For the same reason, it is said in the case of the rioters at Covent Garden Theatre, 2 Camp. 358, that the audience may lawfully express their approbation or disapprobation of an actor; yet if a number of persons go there with intent to render the performance inaudible, though they offer no violence to the house, or any person there, they are guilty of a riot. These authorities, I think, fully sustain the position, that even admitting the acts the defendants performed were not in themselves unlawful, yet they were calculated and intended to excite terror and alarm, and in two of the cases were actually proved to have produced that effect. And in confirmation of this conclusion, it is stated in a note to Russell on Crimes, 1 vol. p. 247, to have been decided in Pennsylvania, in the case of Cubs and others, reported in Addis. 277, "If a number of persons assemble in a town in the dead of night, and by noises or otherwise, disturb the peaceable citizens, it is a riot." The second ground for a new trial, relates exclusively to the case of Miller. He was at the head of the party according to his own declaration. He was not seen in the midst of them; but he was seen coming from where they were assembled in a state of intoxication, with a pistol in each hand. This evidence satisfied the jury, and I am entirely content with the verdict.

The motion is dismissed on all the grounds.

O'NEALL, EARLE, BUTLER and RICHARDSON, Justices, concurred.

Eaves, for the motion.

Player, Solicitor, contra.

Hagood v. Cathcart.

HENRY HAGOOD v. ROBERT CATHCART.

The general rule as to the *reply* is, if the defendant adduce any evidence, the plaintiff's counsel is entitled as of right to the reply. In this case the defendant's counsel *called back* the *plaintiff's* witness, after the plaintiff had closed his case, to prove his defence. **HELD** that the plaintiff was entitled to the reply.

Before EVANS, J., at Fairfield, Spring Term, 1839.

THE report of this case by his honor the presiding judge, is as follows: "There had been large dealings between the parties, amounting to upwards of \$15000. Among the first dealings, the defendant received from Lott & Co., of Columbia, \$364 75, of the plaintiff's money. The action was to recover this sum. In 1835 there was a settlement, but this sum was not brought into the settlement. In 1838, the plaintiff demanded the money. A review of their accounts was made by Mr. Woodward and Mr. Hall, who detected and corrected some errors; but this demand was not brought into the settlement. When it was presented, Cathcart said he thought it was settled otherwise, and if he could not show it paid, he would pay it. Mr. Elder said he made the statement by which the parties settled in 1835. Whilst the papers were preparing, he heard a conversation about money received from Lott. He understood a verbal order had been given by Hagood to Cathcart, to receive \$600 from Lott, of which Cathcart said he had received only 340 or 350 dollars. This gentleman admitted that before the reference he was wholly unable to account for how this money was paid, nor did he pretend to know how it had been settled. He said that as to so much of the account as related to the store, regular charges were made. That Cathcart had several times loaned money and paid debts for Hagood; of these transactions, memorandums were taken and put in a private drawer, and when the money was returned, the vouchers were given up.

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The jury found for the plaintiff, and I thought the weight of the evidence was in favor of the verdict.

On the third ground, it will be necessary to state the facts, in order to understand it correctly. On opening the case, the plaintiff called a Mr. Elder to prove the signature of the defendant to the receipt. He then offered other evidence of what occurred at the time Woodward and Hall attempted to settle the accounts, and closed. The defendant then called back Elder, and examined him to prove his defence, that the matter had been settled by the parties. To this evidence, the plaintiff replied by evidence that at the arbitration, neither Cathcart nor Elder, his chief clerk, pretended to know any thing in relation to this money. Cathcart said he could show it had been paid, by receipts, and if he could not, he would pay it. Under these circumstances, I thought the plaintiff entitled to the reply."

The defendant appealed and now moved for a new trial on the following grounds:

1. Because the lapse of time between the receipt of the money sued for, and the bringing of the action, and the proof of the many settlements which had taken place between plaintiff and defendant during said period, raised such a strong legal presumption of the payment of it, that the jury was bound to find a verdict for defendant, unless the plaintiff had expressly rebutted the presumption: and that the court should so have charged the jury.

2. Because the verdict of the jury was clearly contrary to the evidence of the case; as it was proved that the plaintiff and defendant had a final settlement of their accounts on the 24th of August, 1835, at which settlement the present demand was spoken of by the plaintiff, and not claimed as a credit against the demand of the defendant, or any claim set up for the payment of it, for upwards of eighteen months after said settlement.

3. Because the defendant introduced no witnesses on his part, but only examined the witnesses introduced by the plaintiff, he was legally entitled to the reply in argument, and the court erred in refusing defendant said right.

CURIA, per EVANS, J. The general rule, as stated in Chitty's

Kerby v. Quinn.

Gen. Prac. 3 vol. p. 909, is, if the defendant's counsel adduce any evidence, the plaintiff's counsel is entitled as of right to the reply; and the case cited from 1 Moody & Malkin, 86 and 22, Eng. Com. L. Rep. 259, fully sustains the proposition. In this case the defendant's counsel called back the witness after the plaintiff had closed his case, to prove his defence, viz. that Cathcart had before accounted for the money he received from Lott, and that it had already been settled by the parties. This was surely adducing evidence to discharge him, the defendant, from the plaintiff's demand. All the other grounds relate to the facts of the case, which the jury have no doubt correctly decided.

The motion is refused.

RICHARDSON, O'NEALL, BUTLER and EARLE, Justices, concurred.

Clarke & M'Dowell, for the motion.

Woodward, contra.

TOLLISON KERBY v. WILLIAM B. QUINN.

An administrator who has never had possession of the goods of his intestate, may notwithstanding maintain trover *in his own name*, for a conversion of such goods after the death of the intestate.

The general rule is, that the owner of a chattel *entitled to immediate possession*, may maintain trover against a wrong doer; the legal effect of granting administration, is to vest in the administrator the *legal estate*, in all the intestate's personal property, and this has relation back to the death of the intestate. He is the legal owner, the letters of administration are the evidence of his title, and hence for a conversion in *his own time*, he must always produce and give in evidence the letters of administration.— (S. P. Browning v. Huff, 2 Bail. 174.)

In such a case, it is not necessary or proper that he should sue in his representative character, or style himself *administrator*.

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Before EVANS, J., at Spartanburg, Fall Term, 1838.

THIS was an action of trover for a cream-colored mare and some cotton, alleged to be of the *proper* goods and chattels of the plaintiff, and to have been *converted* by the defendant to his own use. The facts and questions arising in the case, will more fully appear from the report of his honor the presiding judge, which is as follows :

“The plaintiff was administrator of one Berry Quinn, son of defendant, who died at his father’s house in December, 1835. The action was in the name of plaintiff, without styling himself administrator. The property sued for as Berry Quinn’s, had never been in the possession of the plaintiff. It had remained in defendant’s possession from the death of his son Berry. A motion was made for a nonsuit on the ground, that the plaintiff should have sued as administrator. I was inclined to think the action should have been so brought, although the conversion was after the death of the intestate. This seems to have been decided in the case of *Cockerill v. Kynaston*, 4 T. R. 280 ; but the subsequent cases render the question somewhat doubtful. I thought it best to send the case to the jury, who found for the plaintiff.”

After the service upon his honor of a notice of appeal, in this case, upon the grounds hereafter mentioned, he made the additional report which follows :

“After the motion for a nonsuit was refused, and whilst the case was under discussion before the jury, I made out the foregoing as a report, supposing there would be an appeal. Since the trial the annexed notice has been given me, which requires some further report of the case. The second ground alleges for error, that the jury were instructed to allow interest. It was proved, the services of the mare were worth \$20 per annum. I told the jury the plaintiff was entitled to recover the value of the mare and compensation for her use, but advised them to allow the legal interest on her value as a fair compensation for her services, which was less than \$20. I did not charge them to give interest on the cotton ; nor do

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I know that they did ; but if I had so charged, I apprehend it would have been right. In relation to the third ground, I will remark, that the proof on the subject of demand was, that at the time of the appraisement the plaintiff demanded all the property of Berry Quinn—some articles of apparel and other things were produced, and the defendant denied that there was any thing else which was the property of Berry Quinn. Besides, it was clearly proved the defendant had had the cotton gathered and picked, and carried it away from the gin.”

The defendant gave notice of an appeal in this case, and now moved this court for leave to enter up a nonsuit, and in arrest of judgment, on the following grounds :

1. Because the action was brought in the name of Tollison Kerby, and there was no proof that he had either a general or special property in the chattels sued for : either at the time of the action brought, or at any other time.

2. Because the plaintiff proved the cream-colored mare and the cotton, for which this action was brought, to have been in defendant's possession previous to and at the time the action was brought. And that said property was in defendant's possession previous to and at the time letters of administration were granted to Tollison Kerby, on the estate of Berry Quinn.

3. Because the plaintiff, having declared in his *own* name and upon his *own* possession, cannot recover as administrator of his intestate, and on the right and possession of his intestate, not having declared in his representative character of administrator.

4. Because the plaintiff, never having had possession of the chattels sued for, nor a general property in them, cannot maintain an action of trover for them, except in his representative character of administrator; the conversion being previous to, or at the time of his intestate's death, which was proved in this case to have been so.

And failing on these grounds for a nonsuit, he moved the court for a new trial on the following grounds :

1. Because the only count in the declaration, states that Tollison Kerby was possessed of the goods sued for as his own proper

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goods, while the whole of the proof introduced by plaintiff went to show that they were the goods of an intestate, Berry Quinn, on whose estate the plaintiff had administered. To permit this, operated as a surprise on the defendant, he being required by the writ and declaration, only to show that the defendant had not converted the proper goods and chattels of Tollison Kerby.

2. Because his honor charged the jury to find for the plaintiff, if they believed from the evidence, that the mare and cotton belonged to Berry Quinn's estate, and to give interest on what the mare and cotton was proved to be worth, from the time of the demand, which was previous to the alleged conversion of the mare, by plaintiff's declaration.

3. Because there was no demand proven to have been made by the plaintiff of the defendant, for the cotton sued for. And it was in proof that the defendant was picking out the cotton previous to the letters of administration being taken out.

CURIA, per EVANS, J. This case presents the question, whether an administrator, who has never had possession of the goods of his intestate, can maintain trover in his own name for a conversion, after the death of the intestate. The general rule is, that the owner of a chattel, entitled to immediate possession, may maintain trover against a wrong doer. The legal effect of the granting administration, is to vest in the administrator the legal estate in all the intestate's personal property, and this has relation back to the death of the intestate. He is the legal owner, and the letters of administration is the evidence of his title. Hence, for a conversion in his own time, he must always produce and give in evidence the letters of administration.—(Browning v. Huff, 2 Bail. 174.)—It is the evidence of his title and cannot be dispensed with. The plaintiff is required in trover to set out his title in his declaration. It is sufficient to maintain the action, to allege and prove that he is the owner of the chattel sued for. If he prove on the trial that A. B. was the owner and that he is the administrator of A. B., he establishes the title in himself, as fully as if he had proved that A. B. in his life time had conveyed the property to him by deed. The letters of

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administration and the deed are but the evidence of his title, and he need not style himself the administrator of A. B. in the one case, any more than he should style himself the assignee of A. B. in the other. The principle is fully recognized by the case of *Hollis v. Smith*, 10 East. 293, and in *Ballard v. Spencer*, 7 T. R. 358, and in our own cases, 2 Bay. 166, *Ford v. Travis*, 2 Brev. 299, 1 Bail. 79, 2 Bail. 318, where it has been held, that if an administrator sue on a cause of action which arose in his own time, and fail, he shall pay costs, and the reason is because he might have sued in his own name. There is nothing in the other grounds set out in the brief, which requires any opinion.

The motion is refused.

O'NEALL, BUTLER and EARLE, Justices, concurred.

H. H. Thompson, for the motion.

Henry & Bobo, contra.

HATCH, KIMBALL & Co. (judgment creditors of Jas. Simpson,) v.
M. B. CLARK.

In making a motion to the court for leave to file a suggestion to set aside a judgment as fraudulent, it is not necessary for the promovent to serve the opposite party with affidavits of the facts upon which his motion is founded, at the time the notice of the intended motion is served, nor at any time previously to making the motion; nor is it necessary in such a case to take out a rule *nisi*.

In general, when a rule *nisi* is applied for, affidavits are not required; but they must be produced and filed *when* the party makes his motion to make the rule absolute. So where a party has given reasonable notice of the grounds upon which he intends to make his motion, he has done all that he could or need have done *by rule*. *When* the motion is made, the plain-

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tiff should make a satisfactory showing to the judge, by *affidavit*, of its reasonableness and justice.

A suggestion against a confession of judgment as fraudulent, "can only be filed by leave of the court on *cause* shown, creating a reasonable ground to believe that the confession is fraudulent, and upon such conditions as the court may impose." (S. P. Underwood v. Posey, 1 Hill. 266.)

Before RICHARDSON, J., at Abbeville, Spring Term, 1839.

THE plaintiffs Hatch, Kimball & Co., who were judgment creditors of James Simpson, moved before his honor Mr. Justice Richardson, for leave to file a "suggestion, setting forth that the confession of judgment in the case of M. B. Clarke v. James Simpson, was fraudulent and not founded on a bona fide consideration, to which M. B. Clarke, the plaintiff in the said confession, should be required to plead by the usual thirty day rule." His honor the presiding judge, refused the motion, and assigned his reasons for so doing in his report to this court, which is as follows :

"The foregoing motion was made just as the court was about to adjourn, and the affidavit annexed, then offered. The defendant's counsel objected, because his client was gone, and had received no notice of such an affidavit, nor had it been filed. I overruled the motion, on the ground, that the defendant or his counsel ought to have received timely notice of the affidavit itself, and not surprised, by its being withheld to so late a moment. Although, perhaps, upon the actual adduction of the affidavit, the plaintiffs might be entitled to a rule to show cause, &c.; but such a rule was not moved for."

The above named creditors Hatch, Kimball & Co., appealed from the decision, and moved to reverse the same, and renewed their motion, for leave to file a suggestion to set aside the said confession of judgment, on the grounds :

1. That his honor, the presiding judge, erred in holding, that upon a motion for leave to file a suggestion, affidavits of the facts relied on in support of the motion, should have been previously filed with the clerk of the court.

2. Because his honor held, that the proper course of proceeding

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was by rule against the party to show cause why the suggestion should not be filed, which rule should be made returnable to the term next ensuing, that at which it is moved for.

3. Because upon motion for leave to file a suggestion to set aside a judgment for fraud, all that is required, is notice to the opposite party of the time and place of such application, and the grounds upon which it will be made, and all that is necessary in support of the motion, is reasonable cause shown by the affidavit of the party, or others, to be made and presented to the court at the time of the application.

CURIA, per BUTLER, J. The plaintiffs gave the defendant thirteen days notice, that they would move one of the judges of the Court of Common Pleas, at Abbeville Court House, for leave to file a suggestion to set aside as fraudulent a judgment of M. B. Clarke against James Simpson. The defendant objected to the sufficiency of the notice, because it was not accompanied by affidavits setting forth specifically the facts upon which the motion was to be founded; and this objection was sustained by the presiding judge—who held that before the plaintiffs were entitled to make their motion, they should have obtained a rule to show cause, and should have given the defendant timely notice by affidavit, of the facts on which they would rely to sustain their motion. The case presents merely a question of practice, and we are of opinion that the plaintiffs were not bound to serve defendant with their affidavits until they made their motion, nor to have taken out a rule nisi. The course pursued by plaintiffs has the sanction of practice; and was unobjectionable. In general, when a rule nisi is applied for, affidavits are not required; but they must be produced and filed when the party makes his motion to make the rule absolute. When a party has given reasonable notice of the grounds upon which he intends to make his motion, he has done all that he could have done by a rule; and the defendant has every advantage that he was entitled to by such rule. He has notice of plaintiff's intention, and the general grounds of his motion. When the motion is made, the plaintiff should make a satisfactory showing to the judge by affidavit, of its

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reasonableness and justice, before an order would be made to file a suggestion, for the purpose of impeaching a confession of judgment. As was said by Mr. Justice O'Neill, in the case of Underwood vs. Posey, 1 Hill, 266, that such a suggestion "can alone be filed by leave of the court on cause shown, creating a reasonable ground to believe that the confession is fraudulent—and upon such conditions as the court may impose." The motion for such a proceeding is addressed to the discretion of the judge, and if the adverse party has reasonable notice of it, it is all that he can require.

The circuit decision is therefore reversed.

O'NEALL, EVANS, and EARLE, Justices, concurred.

Wilson & Martin, for the motion.

Burt & Thompson, contra.

MARY TILLMAN et al. v. BENJAMIN HATCHER, Ex'or. of LUCY HATCHER.

The appellants, from a decree of the ordinary, establishing a will and admitting it to probate, are entitled to open the case and to reply in evidence and argument, on the trial of the issues made up on the appeal, in the Court of Common Pleas. (S. P. Southerlin et al. v. M'Kinney et al., ante. p. 35.)

The questions of competency to make a will and of undue influence in procuring a will to be made, where there is no exception to the instructions of the judge, or other legal objection, are questions of fact for the jury, and their verdict will not be disturbed.

The subsequent discovery of written documents, *important to the issue*, and either unknown before or entirely out of the reach of the party offering them, has been, it seems, sometimes, though rarely, held a sufficient ground for a *new trial*; but never where the party might by due diligence have procured them before the trial.

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On the trial of an issue in the Circuit Court, made up on an appeal from the Ordinary, involving the competency of the testatrix to make a will, and the question of undue influence in procuring the will to be made, many witnesses were examined, and the testimony was conflicting.—The jury found a verdict for the appellants, disaffirming the will. The executor, the appellee, moved this court for a new trial, among other grounds, upon the *discovery* since the trial of the case, of an older will of the testatrix, than the one *in question*, among *his own* papers. Held insufficient and no ground for a new trial.

Where a witness swears without any knowledge or consciousness of interest in the cause, and without any objection on that account at the trial, the discovery of a document, or other evidence, *afterwards*, which goes to show that the witness was in *fact* interested, does not furnish in itself any ground for a new trial.

Before RICHARDSON, J., at Edgefield, Spring Term, 1839.

THIS case came up on an appeal from the ordinary, admitting to probate a certain instrument, as the last will and testament of one Lucy Hatcher. The report of his honor the presiding judge, is as follows :

“ Lucy Hatcher, aged 93 years, made her last will, in February, 1836. The will was proved in solemn form of law, before O. Towles, the Ordinary of Edgefield District. The Ordinary affirmed the will, which bequeaths the entire property to Benjamin Hatcher, the youngest son of the testator. Whereupon the distributees at law (her children and grand children) appealed from the Ordinary’s decision, upon the following grounds :

1. That Lucy Hatcher was of unsound mind and memory ; and could not, therefore, make any lawful and disposing will.

2. That she was, in fact, imposed upon, and influenced by the exclusive legatee (Benjamin Hatcher) to make such a will, which was no more than a void instrument.

The appellants and appellees, both, claimed the right of replying in evidence and argument. The issue made up, presupposes that the appellants had paid to the appellees, five dollars, and alleges that, if they proved the will to be void, then five dollars were to be repaid to the appellants ; and refers the issue to the Jury.

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I ruled, that both by such pleadings, and the decisions of this Court, the reply belonged to the appellants.

Upon the question of competency of mind in the testatrix, to make her last will, and as to the influence of the sole legatee, Benj. Hatcher, in bringing about so sweeping a bequest in his favor, much, various, and opposite evidence was adduced. The witnesses were fully examined; and it may be seen by the evidence in my notes, that scarcely a witness has not expressed, or plainly implied, his opinion upon the mental competency or incompetency of the testatrix. No objection was urged to such free expression of opinion, until the appellees introduced the subscribing witnesses to the will. At this stage, the appellants counsel objected to the legal right of such witnesses offering their opinion, that her mind was sound at the time of executing the will.

The Court ruled, that the subscribing witnesses, being persons expressly called upon to bear witness to the act, it was their right and duty, to form opinions of the mental capacity of the testatrix at the time; that in this respect, they being selected by her, stood within the reason of professional artists; and as guardians of the true state of her mind. Their opinions must, therefore, be heard, and pass for what they were worth in the judgment of the jury.

The three subscribing witnesses then gave their opinions, that the testator was of sound mind, free to act, &c., though Mr. Goode was not as positive in his opinion, as Lindsay and Napper, the other two witnesses, as regards her mental competency.

Several other witnesses were then examined, and in their narration of the manners, behaviour and expressions of Lucy Hatcher, they, like the witnesses of the appellants, mingled freely, their own inferences, without any objection being made. But upon the close of the examination of ———, the appellee's counsel, asked "if the witness knew of any foolish acts of the testatrix?" To this the opposite counsel objected, as it required the opinion of the witness upon her conduct generally, instead of enquiring for facts only. The appellee's counsel insisted it was not asking for opinions merely; and after some conversation, in which it was clear the princi-

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ple of law was conceded, that opinions did not constitute competent evidence, no decision of the court was asked for, or implied. I suggested that the purpose might be answered, by asking the witness what foolish acts he had ever known done by Lucy Hatcher, and if any, to relate the acts. And I observed that all general inquiries, whether her conduct was consistent or inconsistent, her conversations connected or disconnected, rational or irrational, were without the conceded principle, although, perhaps, every witness had either expressed or implied his opinion while relating the facts. After this all general inquiries for mere opinions, as to the conversations or acts of Lucy Hatcher, whether connected or not, rational or irrational, in the judgment of the witnesses, whenever objected to, were excluded by the court.

At the conclusion of the evidence and argument, it was evident that the decision of the case depended upon two questions of fact: First, whether Lucy Hatcher had still remaining sufficient discretion to make a last will and testament. If she had, then, secondly, whether she had in fact been imposed upon, in her old age and decayed state of mind, so as to deprive her of perfect free agency and influence her to make such a last will as the one exhibited. It may be remarked that, until the year 1834 there was no doubt of Lucy Hatcher's possessing a sound mind. In the fall of that year she had severe illness; and it was afterwards that the witnesses formed different opinions. For instance, Mr. Roberts thought Lucy Hatcher possessed of understanding of great strength and reason, and that after many conversations with her, subsequent to illness in 1834; while Mr. Landrum thought her verging on idiocy after that time. The two classes of witnesses inclined respectively to these opposite opinions, but with much less confidence than Roberts or Landrum. But it was plain that the witnesses for the appellants drew their unfavorable opinions from Lucy Hatcher's very inactive observations of ordinary occurrences; and her very dull memory of them, (as for example the names of persons and faces,) while on the other hand, the opposite witnesses evidently drew their favorable impressions from her capacity to reason right, and her discreet conduct, notwithstanding her dull observation and

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memory. Both sets appeared to allow, that when possessed of the facts, she conversed with propriety and "like other people." No express evidence was offered to discredit a single witness.

Upon the first question I charged the jury very fully, and instructed them, that to make a last will the law required the testator to possess, as is the usual caption of such instruments, "a sound and disposing mind, memory and discretion." That these terms mean a sound or faithful perception of facts, through the agency of the senses. The law did not require a quick or vivid perception, but such as was true; not unsound or faithless. The impression left on the mind should be suitable and just to the thing seen, heard, smelt, tasted or felt. This was sound perception, or in the language of last wills, "sound mind." Second, the memory required must be sound also; it must retain the perceptions received through the senses as they were, not pervert or distort them. Such memory and perception were attributed to every man, and presupposed the reasonable discretion or judgment necessary to constitute a disposing mind, and the right to bequeath property by last will followed, unless the want of discretion appeared, from extrinsic or intrinsic evidence. Had then, Lucy Hatcher, in February, 1836, in her decayed state and at the advanced age of ninety-three years, such perception, memory and discernment? This was the first question for the jury to decide.

The whole argument appealed to the consciousness, observation and reflection of every man, which must constitute his judgment upon the particular subject and case. But the court would not withhold its assistance or opinion. The judgment of the jury must be absolutely independent; but their minds could not be made too reflective or vigilant, upon so unusual a subject and case. I thought myself that the faculty of perception became more and more inactive, as the senses became decayed or dulled by lapse of years. That the strength of the memory depended greatly upon the vividness of perception, and of course generally decayed in the same ratio. Both the sight and hearing of Lucy Hatcher, were proved to be decayed; and her perception and memory, so far as they depended upon those two senses, appeared to be much weak-

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ened. But I did not perceive that they were clearly unsound.— Although inactive, dull and heavy, they did not appear to have become false to their proper objects. I saw no traces of hallucination, or the confounding imaginations or reflections with sensations or the perception of facts. No extreme inactivity, or habitual wanderings of the mind, appeared to have usurped the proper place of her understanding, or judgment of facts, truths or realities. It was allowed that her faculties were originally very good ; and I thought, from the evidence, her reasoning powers very sound to the last ; and her will firm and rational. These were tests of a sound and disposing mind and memory, as before defined, and I saw nothing in her behaviour to disfranchise her, if left entirely free to act for herself. But the jury were to judge for themselves, from her whole conduct, conversations and habits. Of these, we had very properly heard very full evidence ; inasmuch as, under ordinary circumstances, they were the undisguised acting out of a man's will, and therefore, generally well indicate the character, degree, and true state of his whole mind. But, although the court deemed the testatrix competent, that opinion was drawn chiefly from her reasoning powers, as detailed by the witnesses and the apparent firmness of her will, which I thought indicated a mind sufficiently sound for the purpose of bequeathing property. Yet there were grounds for the two opinions, upon the intellectual competency of this aged woman to make any last will and testament. My own opinion was influenced, perhaps, too, by the habitual consideration that where a testator was perfectly free to act for himself, it required no more than a very slow and inactive mind to make a last will. Because there is no competition, no collision of interests, or opposite party to overawe or lead it astray. Where the mind was not unsound, the law would support even its seeming caprice in a last will—a bequest was often a caprice. But we should be slow to underrate the mind of another on that account. The suspicion arose, often, from a mere difference in sentiment, and sometimes from our own weakness. Men, too, would fancy they saw light, or darkness, in another's mind ; when, in fact, such different opinions were apt to arise from what was before assumed to be

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desirable, suitable, or just, in the result of a given case. In the one before us, such a class of respectable witnesses on each side, intimated the necessity of much consideration in forming our final decision upon the legal competency of Mrs. Hatcher's mind, independently of any such prepossessions. In the course of the examination I had drawn conclusions very opposite to those indicated by some of the witnesses, from their own narrative of Lucy Hatcher's conduct and conversations ; and, finally, inclined much more to the opinion of Mr. Roberts than that of Mr. Landrum. But the jury might differ from mine. They too were to form their own independent opinion and to follow it.

Upon the second question, the court instructed the jury, that (assuming Lucy Hatcher of competent "mind, memory and discretion," to make a last will,) they were to decide whether she had been imposed upon and swayed to make the will in question, without her own deliberate wish and inclination, so to bequeath her entire property to one son exclusively. That this was an inquiry in the nature of fraud, and belonged clearly to the jury. Benjamin Hatcher had himself procured the will to be drawn—and her great age, weakness and partiality for her youngest son, rendered it very possible that the testatrix had been unfairly influenced. On the other hand, her partiality to him appeared of long standing, and might be deemed consistent, and the opinion formed of her understanding would have its influence ; but the court would intimate no opinion of its own ; upon so plain a question of fact, the jury required no assistance. Was she or not a perfectly free agent at the time of executing the supposed last will ? was the point."

The jury found a verdict setting aside the will.

The defendant, Benj. Hatcher, the executor of the will in question, gave notice of his intention to move, and now moved this court for a new trial :

1. Because the right of opening and replying in evidence and argument was refused to the executor, whereas in all such cases, the trial being *de novo*, this right belongs to the party propounding the will : and especially where, as in this case, the feigned issue presents the question of will or no will nakedly, without reference to

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the proceedings before the ordinary, or to the grounds upon which his decree was impugned.

2. Because the witnesses in behalf of the executor were not permitted to express their opinion that the testatrix was of competent understanding; not even to say that her discourse was connected, or that her conversation and acts were rational, or that she understood the value of property, or any thing including an opinion—and this, although of the witnesses against the will, one had hurried out an opinion that her conversation was flighty and disconnected, supported by no instance; and another (an influential clergyman,) had commenced by saying, that she was in her dotage, and for support of his opinion, could specify no facts or circumstances, except that at her daughter's funeral, she looked stupid, and was disinclined to conversation.

3. Because the verdict can be ascribed only to the prejudices of the jury, striving to do a fanciful justice by dividing the testatrix's property, rather than letting all go to the sole legatee, and was not warranted by any sufficient proof either of defect of understanding, or want of free agency on the part of testatrix.

4. Because the verdict depends solely on the testimony of witnesses; who, through parents or through children, have indirect interest in setting aside the will and strong feelings in the question; this testimony is in itself, insufficient, and is opposed by testimony of greater weight in favor of the will; and in such cases, the Court of Appeals, exercising the powers of an appellate ecclesiastical tribunal, is bound to scrutinize the facts more closely than it ordinarily does in cases of fact submitted to a jury.

On the 5th of April, 1839, the defendant served Mr. Carroll with the following notice:

“The defendant will rely as an additional ground, for new trial on the following ground:

“That, since the trial, he has discovered new and important testimony, namely, a will of Lucy Hatcher, executed June 14, 1833, which has the effect of rendering Jonathan Tillman, Tabitha Tillman, and Frank Bettis, incompetent witnesses, and of con-

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tradicting the first named of said witnesses in an important particular of his testimony.”

And in support of this ground, produced an affidavit, of which the following is a copy :

“ SOUTH-CAROLINA, }
 Edgefield District. }

“ Benjamin Hatcher, senior, being duly sworn, deposes, that since the trial of the issue of Ben. Bettis and others, against himself, he has discovered a former will of his mother, Lucy Hatcher, executed 14th June, 1833, which he is advised, contains important evidence affecting said issue—that having been repeatedly and urgently so instructed, by his counsel, he made repeated and diligent searches for said former will before the trial of said issue, as well among his own papers, as those of his mother, but without success—that at length, some days after the trial, he found said will, inside of an old deed, in a bag containing old papers of little value ; that he is confident that he did not place said will where it was found, and thinks it probable it was placed there about four years ago, while he was laboring under a spell of illness, without his attention being called to the circumstance ; and certainly he has now no remembrance concerning the placing of the paper there, and had little reason to expect it where it was casually found.

BENJAMIN HATCHER.

Sworn to before me, 2d May, 1839.

GEO. POPE, C. C. P.”

CURIA, per RICHARDSON, J. 1. Whether the appellants or appellee had a right to begin and end the evidence and argument upon the appeal from the Ordinary, has been before decided in the case of Southerlin v. M’Kinney, ante. p. 35. In that case, it was decided, upon very full consideration, that according to practice in this State, the appellant has the right ; and the court feels itself bound to follow that rule. The decision established the practice. 2d. Whether the testatrix, Lucy Hatcher, was of sound and disposing mind, memory and discretion at the time she executed the last will submitted to the Ordinary ; and whether the testatrix was not un-

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duly influenced to make such a will, so as to deprive her of free agency, and render it a void instrument. I have to observe, that the presiding Judge, on the circuit, was satisfied, by the evidence, of the mental competency of Lucy Hatcher, to make such last will—that her mind was sound, and her will firm, and that it would have taken great address and influence to have deprived her of free agency, or swayed her at all, in a matter of importance, although her perception and memory were much decayed. That with this opinion of Lucy Hatcher's mind and firmness of purpose, he could not perceive in the evidence, sufficient proof of such undue and improper influence as to disaffirm the decree of the Ordinary, admitting the will to probate. But both of these questions were submitted to the proper tribunal for the decision of facts, with full instructions upon the legal meaning of a sound mind, memory and discretion in testators; and the jury have, by their verdict, annulled the will. It was within their peculiar province and jurisdiction so to do; and this court, under all the circumstances and character of the particular case, does not perceive sufficient reason to interfere with the verdict, by ordering a new trial. Upon this head, it may be observed, that the discovery of the former will and the codicil, will still leave Lucy Hatcher by no means altogether disfranchised of her right to make a will, and that in her own way, with her prevailing disposition, which seems to have been uniform. It is highly satisfactory, that this is to be the result, in the old lady's interesting case. The only other ground relied upon for a new trial arises from the late discovery of a former will of Lucy Hatcher, which, if known at the trial, would have rendered three of the witnesses interested, and therefore incompetent to give evidence, and would have contradicted one of them in part. The discovery of the former will is set forth in the affidavit of the appellant, Benjamin Hatcher.—(See ante. p. 279.)

The subsequent discovery of written documents, important to the issue, and either unknown before, or entirely out of the reach of the party offering them, has been sometimes held a sufficient ground for a second trial; but "rarely," says Judge Waties in the case of *Drayton v. Thomson*, (1 Bay, 261,) and "never," he

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adds, "where the party might, by due diligence, have procured it before." Does the discovery of Lucy Hatcher's will, of June, 1833, come up to these prerequisites, or, even, only one of them? 1st. That will could have furnished no evidence upon the issue—whether Lucy Hatcher was of sound and disposing mind in February, 1836; or whether she had been unduly swayed in executing the supposed will of that year. Wherein was it important? But again, the will of June, 1833, was in the possession of Benjamin Hatcher, and it is plain, that he had knowledge of such a will. He had been advised to search for it; but did not search so diligently as to find it, until the trial was over: when he searched again, and found it among his own papers. Without discrediting Mr. Hatcher's moral truth in this matter, we must not encourage such negligence, by ordering a new trial. He must abide the consequence of such extreme inactivity in his own concerns; and the neglect of the duty due to others. When we consider the hot contest between him and the distributees of Lucy Hatcher, such negligence was scarcely less than culpable. Let us suppose the will of 1833 had been before the court, at the trial of the appeal from the ordinary; it could have done no more than prevent the evidence of Jonathan and Tabitha Tillman, and Frank Bettis, by showing they were interested in that former will. But such interest being unknown to themselves, could not lessen the credit due to their past evidence. The objection offered is merely technical and prospective. It does not go back to the issue already tried and decided. It may have contradicted, in part, Frank Bettis, and therefore weakened his evidence; but that would not destroy it. It should be here, too, kept in mind, that those witnesses were introduced to disprove the sound mind and understanding of Lucy Hatcher, which was not the ground really relied upon by the appellees. The true question before the jury was, whether this ancient testatrix had not been coaxed, cajoled, or in some way deceived, and tricked, in carrying her known partiality for her youngest son, into the extreme of bequeathing to him her entire property. And I have no doubt, that Mr. Hatcher's permitting and encouraging such a sweeping bequest to himself, when pro-

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curing the will, was left by his aged mother to his hands, and the dislike of monopolies had weight with the jury. But the moral is good, and where there is no plain legal objection we must not disturb such a verdict. I have only to add, upon this last ground, that objections to the competency of witnesses, to avail, must be made during the trial, at farthest ; and that the subsequent discovery, that a witness was incompetent, is not, in itself, sufficient ground for a new trial. (See *Turner v. Pearte*, 1 Term Rep. 717, where this question is well considered by Buller.) Such objections depend upon the particular case, as where the opposite party was deceived ; or the evidence was of great weight, and the like ; but is not, of itself, a substantive ground for a new trial. Upon the whole, then, the court is constrained to follow the common rule, that where the case consists of facts which have been fairly submitted to the jury, with full instructions from the court, their verdict concludes the case.

The motion for a new trial is therefore dismissed unanimously.

EARLE, EVANS and BUTLER, Justices, concurred.

Wardlaw & Wardlaw, for the motion.

J. P. Carroll, contra.

PRISCILLA HOLLY, Adm'x of BENJ. HOLLY, v. JOHN THURSTON.

There is nothing in the act of 1769, (P. L. 270,) creating the *summary process* jurisdiction of the Court of Common Pleas, and providing, among other things, that in "such suit, the plaintiff and defendant shall have the benefit of all matters, in the same manner as if the suit was commenced in the ordinary forms of common law or equity," nor in the 34th rule of court, prescribing the terms upon which either party may have a *discovery* under this clause of the act, which favors the idea that the discovery

to be obtained under it, can be demanded in a case where the Court of Equity would refuse it.

Where the plea of the statute of limitations was interposed by the defendant to the plaintiff's account, in a summary process, an interrogatory, seeking to discover from the defendant, whether he had not, since and when, promised to pay the plaintiff's account, was *held* incompetent and irregular, and that the defendant was not bound to answer the same.

THIS was a petition and process on an account for work and labor by the plaintiff's intestate. The demand was barred by the statute of limitations, which was pleaded. To prove the demand, interrogatories were propounded to the defendant, there being no other evidence; and to avoid the statute, the following question was put to him: "Have you not since the 1st of January, 1881, and when—state particularly—promised the administrator, the plaintiff, to pay this account?" This, it was objected on the part of the defendant, was incompetent: that he could not legally be required to answer that question.

His Honor, the presiding Judge, overruled the objection, and the plaintiff had a decree.

The defendant appealed, and now moved to reverse the decision below, and for a new trial, on the ground :

That the defendant was not bound to answer the second interrogatory propounded by the plaintiff, and which was the only evidence offered, to prove a subsequent promise.

Glover for the motion. Neither the act of assembly of 1769, (P. L. 270,) nor the 34th rule of Court, (rules of 1837,) gives the plaintiff or defendant any other benefit than he would enjoy, "if the suit were commenced in the ordinary forms of common law or equity." The act of assembly, as well as the rule of court, were intended to assimilate these cases to the practice in Chancery.—*Clark v. Meek*, 2 Bail. 391.

In Chancery, the defendant is not bound to make any discovery, which would destroy the effect of his plea. The defendant has filed a good plea in bar ; but by this proceeding, the authority

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of the statute may be defeated. As to the practice in Chancery, the case of *Lansing v. Starr*, 2 John., C. R. 150, is in point.

CURIA, per O'NEALL, J. The act of 1769, (P. L. 270,) after authorizing the Judges to hear and determine causes, in which the demand is not more than £20, in a summary way, provides, "in which suit the plaintiff and defendant shall have the benefit of all matters, in the same manner as if the suit was commenced in the ordinary forms of common law or equity." The 34th rule of court prescribes the terms upon which either party may have, under this clause of the act, a discovery. But there is nothing in the rule which favors the idea that the discovery to be obtained under it can be demanded in a case where the Court of Equity would refuse it. If it were so, the rule would be perfectly nugatory, for the only authority which the Judges of the law court have to require a discovery, is the provision of the act of 1769, giving to the parties the benefit of all matters, as if the suit were commenced in equity. Speaking of the former rule, in this respect, of which the 34th is a mere transcript, the present presiding Chancellor, (then Mr. Justice Johnson,) in the case of *Clark v. Meek*, 2 Bail. 391, said it "was intended to assimilate those cases (summary processes,) to the practice in Chancery." In a summary process, the party demanding a discovery, is to be considered as in equity, seeking discovery and relief; and if that court, on a bill filed, would compel the party to answer, then the law court must also require it.

In Beame's *Pleas in Equity*, 165, the rule is stated to be, that "the statute of limitations is a good plea in bar to the relief sought by a bill, as it is a good special plea in bar to an action at law." Upon such a plea, there filed, it could not be pretended, that the defendant should answer until his plea was considered, and overruled. It is a legal bar to any legal or equitable remedy; and until removed, the court cannot proceed further in the cause. The case of *Lansing v. Starr*, 2 J. C. R., 150, is full to the very point before us. It was in that case held, that the statute of limitations was a good plea in bar, to a bill seeking a discovery to avoid the

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plea of the statute of limitations to an action pending between the parties at law. That case is this :—For here the discovery is sought to overrule the plea. It is, hence, clear, that a party cannot be called upon to make a discovery to overrule the plea of the statute of limitations.

The motion to reverse the decision below, and for a new trial is granted.

EVANS, EARLE, and BUTLER, Justices, concurred.

Glover, for the motion.

Whitmore, contra.

RICHARD HILL, adm'r of MARY HILL v. PATRICK BRENNAN.

Trover for negroes. The intestate, Mary Hill, had had the negroes in her possession for thirty years. For the years 1834 and 1835, the defendant, Brennan, hired the negroes from her. In 1836, after the term of hiring expired, the negroes were demanded, and Brennan refused to return them. Mary Hill, the plaintiff's intestate, took out letters of administration on the estate of her husband, John Hill, who had been dead thirty years, and returned these negroes as a part of his estate. In the fall of the same year, Mrs. Hill died; Brennan kept possession until about Christmas, when the negroes were taken out of his possession by some of the distributees, and were sold, for a division, in January. The plaintiff, as the administrator of Mary Hill, brought an action of trover against Brennan, in which he claimed the hire of the negroes for the year 1836. *Held*, that by hiring the negroes from Mrs. Hill, the defendant acknowledged her title, and could dispute it only by showing that she had parted from her title to him, or some other person; that on his refusal to deliver the negroes, she had a right to sue him, that this cause of action descended to her administrator, the plaintiff, and that the circumstance that she afterward took out letters of administration on John Hill's estate, and inventoried these negroes as a part of his estate, did not vary the case.

Hill v. Brennan.

An administrator is the legal owner of the goods of the intestate, by relation, from the death of the latter, and may maintain trover for a conversion of the goods, since the intestate's death, in his or her own name.— (S. P. Kerby v. Quinn, ante, p. 264.)

Before EVANS, J., at Fairfield, Spring Term, 1839.

THIS was an action of trover, for negroes. The intestate, Mary Hill, had had the negroes in her possession for thirty years. For the years 1834 and 1835, Brennan hired the negroes from her. In 1836, after the term of hiring expired, Brennan refused to return the negroes. They were demanded, and he refused to return them. In May, 1836, after demand and refusal, Mary Hill took out letters of administration on the estate of her husband, John Hill, who had been dead thirty years, and returned these negroes as a part of his estate. In the fall of the same year, Mrs. Hill died—Brennan kept possession until about Christmas, when the negroes were taken out of his possession by some of the distributees, and were sold, for division, in January following. The plaintiff claimed only hire of Brennan for the year 1836. The question was, whether the plaintiff, after his intestate had inventoried and returned the negroes as belonging to John Hill's estate, could maintain the action. His honor, the presiding judge, decided that he could. Before Mrs. Hill administered, Brennan had hired the negroes of her, and refused to return them. That by the hiring he was estopped to deny her title.

The defendant now moved the Court of Appeals for a new trial or nonsuit, on the ground :

That the negroes, which were the subject of the action, being the property of the estate of John Hill, of which Mary Hill was the administratrix, the right of action did not go down to her administrator.

CURIA, per EVANS, J. By hiring the negroes from Mrs. Hill, the defendant acknowledged her title, and could dispute it only by showing that she had parted from her title, to him, or some other person. Upon his refusal to deliver, she had a right to sue him,

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and this cause of action descended to her administrator, the plaintiff. The circumstance that she afterwards took out letters of administration on John Hill's estate, and inventoried these negroes as a part of his estate, could not vary the case. She was still the owner of the negroes in law, and according to the case of *Kerby v. Quinn*, decided during the present term, (ante. p. 264,) could maintain an action for the defendant's conversion in her own name.

The motion is therefore dismissed.

O'NEALL, EARLE and BUTLER, Justices, concurred.

M'Call & Hammond, for the motion.

Clark & M'Dowell, contra.

EBER SMITH v. H. O. WINGO.

The act of 1789, (P. L. 482,) in relation to granting administration, applies to cases where the executors of a will are dead, or refuse to qualify, as well as to cases of intestacy.

By that act the ordinary is compelled to grant administration in the order prescribed. The grandson of a deceased testator is, in a class, preferred to mere next of kin; of these last, in a case of intestacy such as may be entitled to a distributive share, would be entitled to administration; but this provision does not apply where there is a will.

In the case of the next of kin, as a class entitled to administration, the ordinary may select one, preferring among them (as he most probably would) he who has an interest under the will.

But as against a stranger, any of the enumerated persons in the statute are entitled to preference, and the ordinary would be bound to commit administration accordingly.

According to the case of *Thompson v. Huchet*, 2 Hill. 347, the ordinary, at the instance of any of the parties enumerated in the statute as entitled to administration, would be bound to revoke an administration committed to a stranger, and grant it to the applicant.

Smith v. Wingo.

Before O'NEALL, J., at Spartanburg, Spring Term, 1839.

THIS was an appeal from the decision of the ordinary, under the following circumstances :

The ordinary granted to the appellant, Eber Smith, administration, with the will annexed, of the goods, chattels and credits, of Obadiah Wingo, (deceased.) The appellant was a stranger in blood to the deceased, and had no interest under his will. He commenced suits for the recovery of chattels belonging to his testator. The appellee, who was of the next of kin to the testator, and had no interest under his will, applied to the ordinary to revoke the letters of administration, *cum testamento annexo*, granted to the appellant, which the ordinary accordingly did, and committed administration, *cum testamento annexo*, to the appellee. His honor the presiding judge, thought the case of *Thompson v. Huchet*, 2 Hill. 347, had decided the very point against the appellant, and directed the jury to find for the appellee, which they did.

The appellant now moved for a new trial on the following grounds :

1. Because administration, with the will annexed, of Obadiah Wingo, having been granted to Dr. Eber Smith, and he having by virtue of such administration, commenced several suits, the ordinary had no right to revoke such administration and grant it to one, who, though of kin, had no interest in the estate, unless some act of mal-administration had been shown.

2. Because his honor erred in holding, that such revocation abated the suits commenced by Dr. Eber Smith, as administrator, with the will annexed.

CURIA, per O'NEALL, J. The act of 1789, P. L. 482, applies to cases where the executors of a will are dead, or refuse to qualify, as well as to cases of intestacy. By it, the ordinary is compelled to grant administration in the order prescribed. The appellee, as a grandson of the deceased is, in a class, preferred to mere next of kin. Of these last, in a case of intestacy, such as may be entitled to a distributive share, would be entitled to administration; but

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this provision does not apply where there is a will. In the case of the next of kin, as a class entitled to administration, the ordinary might select one, preferring among them (as he most probably would) he who had an interest under the will. But as against a stranger, any of the enumerated persons in the statute are entitled to preference, and the ordinary would be bound to so commit administration. According to *Thompson v. Huchet*, 2 Hill. 347, he would at the instance of any of these parties, be bound to revoke administration committed to a stranger, and grant it to the applicant. Indeed, according to that case, a stranger, to whom administration is committed, is the mere nominee of the ordinary, and he may revoke his appointment and commit it to another. In that view, I am disposed to concur. But it is sufficient for this case, that the appellee is entitled by law to the administration, in preference to the appellant—and that to fulfil the law, the ordinary did right in revoking the appellant's administration and committing it to the appellee.

The motion for a new trial is dismissed.

RICHARDSON, EVANS, BUTLER and EARLE, Justices, concurred.

Young, for the motion.

JESSE ALLEN v. LOUISA SINGLETON.

In all cases of contract, where the demand does not exceed twenty dollars, the jurisdiction of a Justice of the Peace is, by the act of 1824, p. 25, declared to be exclusive.

Since the passage of the act of 1824, it has been repeatedly decided, that in *summary process* cases, to entitle himself to a decree, the plaintiff must establish to the satisfaction of the presiding judge, a demand *beyond twenty dollars*. See *Davidson v. Setzler*; *Cline v. Craven*; *Logan & M'Intyre*

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v. Cobb, (not reported) ; and Ferguson v. Femster, 1 Bail. 516: an exception in the case of Nance v. Palmer, 2 Bail. 88, was compelled to be made where the case went to the jury.

Before GANTT, J., at Sumter, Spring Term, 1839.

THIS was a suit by way of *summary process*, brought to recover the amount of an account, consisting of a charge for *hewing*, and a balance due for making a cotton screw. The charge for hewing was embraced in the contract for making the screw. His honor the presiding judge, thought the charge for *hewing*, colorable merely, and therefore gave a decree for the defendant, reserving the right of the plaintiff to sue in the proper court, to recover the ten dollars for making the screw. The price for making the screw was fifty dollars—forty dollars of which had been paid.

The plaintiff now moved the Court of Appeals to reverse the decree of his honor, on the following grounds :

1. Because his honor, by his decree, admitted that the plaintiff was entitled to ten dollars from defendant, and yet decreed for the defendant.

2. Because the party suing for an amount over a magistrate's jurisdiction, and admitted by the court to be entitled to recover a sum within such inferior jurisdiction, is entitled to a decree for the sum, if it appear that the whole demand sued for was not merely colorable, with a view to carry the suit into the higher jurisdiction.

3. Because the decree was against the law and evidence.

CURIA, per O'NEALL, J. In all cases of contract, where the demand does not exceed twenty dollars, the jurisdiction of a justice of the peace is, by the act of 1824, (acts of 1824, p. 25,) declared to be exclusive. Since its passage, it has been so often ruled in summary process cases, that the plaintiff, to entitle himself to a decree, must establish to the satisfaction of the presiding judge, a demand beyond twenty dollars, that I confess I was surprised to find there was such a doubt among the profession, as to excuse an

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appeal. The cases of Davidson v. Setzler; Cline v. Craven; Logan & M'Intyre v. Cobb; and Ferguson v. Femster, 1 Bail. 516, have been uniform on the point. An exception in the case of Nance v. Palmer, was compelled to be made where the case went to the jury.

The court think that the judge below decided correctly: but as his decree for the defendant may preclude the plaintiff from recovering the ten dollars to which he is entitled before a justice, and as it is plain he did not intend that his decree should have that effect, it is ordered that the decree for the defendant be set aside and that the plaintiff be nonsuited.

RICHARDSON, EVANS, EARLE and BUTLER, Justices, concurred.

Moses & Miller, for the motion.

C. W. Miller, contra.

M'KEE & M'ELHENNEY v. MOSES STROUP.

Though a debt due by one partner cannot be set off against a demand due to the partnership, yet when one is indebted to a partnership, and during the existence of it delivers flour, bacon, or other articles, to *one* of the partners, which it is understood between them shall be received in payment of the partnership demand, the debtor is discharged on the ground of *payment*; and the circumstance that the articles were applied to the individual use of the partner receiving them, does not vary the case.

Before EVANS, J., at Union, Spring Term, 1839.

The report of his honor the presiding judge, is as follows:

"The plaintiffs were merchants and sued the defendant on an account for goods sold and delivered. The defence was a discount

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for flour, bacon, &c., which the defendant sold to M'Elhenney.— M'Elhenney acknowledged the receipt of the flour and bacon. He said he was to give credit on the account for the flour. In relation to the bacon nothing was said; but it was his own calculation that it was to be paid for in the same way. He expected to have a settlement, and intended it to go in payment of the account. I thought from this evidence, it was understood between the parties, that the bacon and flour were to be received, and in fact were received in payment of the account; and, therefore, although furnished for the private use of one partner, was a payment of the account."

The plaintiffs now moved this court to reverse the decision of the circuit court and for a new trial, on the following grounds:

1. Because the court admitted in evidence and allowed a discount of defendant, the said discount being an account of defendant's against W. H. M'Elhenney alone, (who was one the firm of M'Kee & M'Elhenney,) the said firm having been long since dissolved, and the said M'Elhenney not authorized to collect and settle the debts of the same after dissolution thereof.

2. Because the account, as stated in defendant's discount, not having been actually settled before the dissolution of the copartnership, should not have been allowed by the court to be set off as a discount to an action brought by the firm against defendant.

3. Because the court allowed defendant's discount against the firm, where, from the evidence, there was no proof of a positive agreement to settle defendant's account against the claim of the firm.

4. Because there was no evidence to support defendant's claim against the firm, except the testimony of W. H. M'Elhenney, one of the copartners of the firm, (which could amount to nothing more than the acknowledgment of one copartner made after dissolution,) that it was understood by him (M'Elhenney) that his individual debt, due to defendant, should be settled by discounting it against the debt due by defendant to the said firm; which was not sufficient to discharge defendant from paying the said debt due to the firm.

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CURIA, per EVANS, J. There is no doubt that a debt due by one partner, cannot be set off against a partnership demand, and I apprehend that a mere promise of one partner to accept his own debt as a payment, or a discount, does not bind the other partners.— But it never has been questioned that one partner, during the existence of the partnership, may receive payment from a debtor, in flour, bacon, or any thing else, and the circumstance that such articles were applied to his own use, cannot vary the case. On the trial of this case, M'Elhenney was sworn as a witness to prove the plaintiffs' demand. On his cross examination, he said there was an agreement that the flour was to be credited on the account.— When the bacon was afterwards delivered, there was no express contract that it was to be received in payment, but his understanding was, it was to be paid for in the same way as the flour, and he intended it to go in payment of the account. I had no doubt then, nor have I any now, that when the bacon was delivered, it was understood by both parties that it was in payment of the account. It was on the ground of payment made during the existence of the partnership, and not on the ground of discount, that I decreed for the defendant.

My brethren concur in that opinion—and the motion is refused.

O'NEALL, EARLE and BUTLER, Justices, concurred.

Matthew Williams, for the motion.

Dawkins, contra.

ISAAC MOTHERSHED v. JAMES CLIBURN.

In an action on a lost note, the plaintiff is incompetent to prove the loss of the note sued on. His declarations are equally incompetent to the same purpose. (S. P. Sims v. Sims, 2 Con. Rep. 225; Davis & Tarleton v. Benbow, 2 Bail. Rep. 428; Darby v. Rice, 2 N. & M'Cord. Rep. 598.)

Mothershed v. Cliburn.

Before GANTT, J., at Kershaw, Spring Term, 1839.

THE report of his honor the presiding judge, is as follows :

“ This was a summary process brought to recover a balance due on a note alleged to be lost. As to the justice of the demand on the part of the plaintiff, not a shadow of doubt could exist in the mind of any one. The difficulty was to prove that the note had been lost, a thing almost impossible to be done. A rumor had existed in the neighborhood that the plaintiff had lost a pocket-book.— A pocket-book was found, and a man by the name of Tomly, to whom it was delivered, carried it to the plaintiff, having heard of the plaintiff's loss. He told Tomly that the pocket-book found was not his, and stated to Tomly in this conversation how much he had lost in his pocket-book, to wit. \$40. This, from the evidence, appeared to be the amount due on the defendant's note, given to the plaintiff. Permitting this declaration of the plaintiff's, with some others, twelve months before, to Newsom, that he had lost his pocket-book with the defendant's note in it, has given rise to this appeal, on the ground that it was inadmissible to permit the plaintiff's declarations to be given in evidence. Who else but the plaintiff could tell of the loss? If this decree rested on those declarations alone, as to the justice of the plaintiff's demand, there would be reason why they should not be received ; but where it appeared most clearly in evidence that the defendant, when pressed for money to satisfy executions against him, found a friend in the plaintiff, who advanced him the money and took the note in question for the amount advanced, the plaintiff's declarations about the loss of his pocket-book with defendant's note in it, was admissible *ex necessitate*, to remove all suspicion of its being a trumped up demand on the part of the plaintiff, and thereby prevent the defendant from realizing the dishonest plan he had conceived of defeating the plaintiff, (if possible,) from the recovery of a debt contracted under circumstances such as I have related. I attach to this report the testimony which is conclusive, (and strongly so,) as to the right of the plaintiff to demand of the defendant the amount for which the de-

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cree was given. I see from referring to my notes, that the defendant had paid a part of the amount of the note, leaving a balance of \$15, for which the decree was given."

The defendant now moved to reverse the decree of his honor the presiding judge, for a nonsuit, or a new trial on the following grounds:

1. That his honor erred in admitting the declarations of the plaintiff, Mothershed, as to the loss of the note sued upon, there being no other evidence but such declarations that the note was in fact lost.

2. That even supposing the testimony competent, it was not proved that Mothershed's declarations related to the note in question: but the testimony left it equally probable that some one of various other notes was referred to by plaintiff.

CURIA, per EVANS, J. In the case of *Sims v. Sims*, 2 Con. R. 225, and *Davis & Tarleton v. Benbow*, 2 Bail. R. 428, it was decided, expressly, that the plaintiff is incompetent to prove the loss of the note sued on, and in the latter case all the arguments *ab inconvenienti*, are considered by the court.—And if the plaintiff's oath cannot be received for this purpose, much less shall his declarations be allowed to establish the fact. The general rule is stated in *Darby v. Rice*, 2 N. & M'Cord. R. 598, to be, that a party to a suit cannot prove his case by his oath or declarations; but that was a case depending on its own peculiar facts, and is considered an exception to the general rule.

This case has been held, in the cases before cited, not to constitute an exception—and the motion for a new trial is therefore granted.

RICHARDSON, O'NEALL, BUTLER and EARLE, Justices, concurred.

Withers, for the motion.

Smart, contra.

Nesbit v. Taylor.

JAMES NESBIT v. THOMAS TAYLOR, Ex'or. *de son tort* of STEPHEN WILSON.

SAME v. B. DAYSHIELD'S, Ex'or., *de son tort* of SAME.

The plaintiff was a creditor of one Stephen Wilson, (deceased.) After the death of Wilson, his wife advertised and sold his personal estate ; at this sale the defendants severally purchased. Taylor bought a horse, for which he subsequently paid, (what the defendant in the other case bought did not appear). The plaintiff had notice of the sale, but made no objection; the defendants probably knew that no administration had been taken out on the estate. **HELD**, that although the acts done by the widow of the deceased, were such as might have been done by a rightful executor, and the defendants probably knew there was no administration, yet they might have bought, supposing her to be the executrix of the testator's will, and were not liable as executors *de son tort*.

A creditor has no right to the property of the deceased, he is merely to be paid out of it; when it is shown that it has been sold by one who had no rightful authority to sell, that act constitutes the party selling it an *executor de son tort*, and makes him liable to the extent of the funds *thus* received for the creditor's debt. This is enough for his rights, and he has no right to follow the property into the hands of the *vendee*.

Before O'NEALL, J., at Spartanburg, Spring Term, 1839.

The report of his honor the presiding judge, is as follows :

"These were summary processes, tried before me at the last Spring term. The plaintiff was a creditor of the late Stephen Wilson, (deceased,) and attempted in these cases to make the defendants liable as executors *de son tort*. After the death of Stephen Wilson, his wife advertised and sold his personal estate. At that sale the defendants purchased. The defendant Taylor, bought a horse, for which he subsequently paid. What the other defendant bought did not appear, so the case against Taylor was the only one in which evidence was given. The plaintiff had notice of the sale and made no objections; the defendants probably knew that there was no administration. I thought, on the proof, that Mrs.

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Wilson was to be considered as executrix from her wrongful acts, and that the defendants were not liable to the creditor. On expressing this opinion, the plaintiff in both cases submitted to a nonsuit, with leave to move the Court of Appeals to set it aside."

The plaintiffs appealed, and now moved this court to reverse the circuit decision, on the grounds:

1. Because the defendants used the property of the deceased without any legal authority to do so, and sold and disposed of the same as their own, which constitutes them executors *de son tort*.

2. Because the purchase of property from the widow, knowing that it belonged to the estate of the deceased, and that she was not the rightful executrix, nor had any other legal authority to sell, expressly with the view of leaving the State—the purchaser afterwards using and disposing of the property, constituted him executor *de son tort*.

3. Because the decision was against law.

CURIA, per O'NEALL, J. The acts done by the widow of the deceased, were such as would usually have been done by a rightful executor. She sold his property at a public sale. The plaintiff, a creditor, was informed of it and made no objection. Under these circumstances, although the defendants probably knew there was no administration, yet they might have bought, supposing her to be the executrix of the testator's will. For, as was said by judge Huger, in *Johnson v. Gaither*, in *State Reports by Harper*, 6, "a stranger who sees one acting as executor, may presume that there is a will in which he is appointed executor. A stranger is not bound to enquire into an executor's title; if there be an appearance of it, it is sufficient." That case is decisive of these, for there the defendant purchased corn belonging to the deceased, from the widow, and it was held not to constitute him an executor *de son tort*. A creditor has no right to the property of the deceased; he is merely to be paid out of it. When it is shown that it has been sold, that act constitutes the party selling it an executor *de son tort*, and makes him liable to the extent of the funds thus received, for the creditor's debt. This is enough for his rights, and he has no right

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to follow the property into the hands of the vendee. If administration be taken out and the administrator sues for the recovery of the property, then unless the vendee could show that his vendor had a perfect legal right to sell the property, the administrator must recover. For then the issue is, is the property still the goods and chattels of the deceased?

The motions are dismissed.

EVANS, EARLE and BUTLER, Justices, concurred.

Henry & Bobo, for the motion.

E. H. SLEAD v. WM. BRANNAN, adm'r of CROWDER.

The admission of an administrator as to a fact within his own *personal* knowledge, and which he could be compelled to prove, if he were not a party to the suit, is admissible in evidence in an action against him as administrator, to charge the estate of the intestate.

On a summary process against an administrator, by the plaintiff, to recover the amount of a note signed by himself and the defendant's intestate, (Crowder,) which the plaintiff had paid, and which he alleged he had signed as security only for Crowder, the declaration of the administrator, "that *he knew* the note was given by Crowder at Ingram's sale, and that Slead, the plaintiff, was security," was held competent and sufficient evidence of the fact.

Under the 34th rule of court in relation to the process jurisdiction, *it seems* the administrator (the defendant,) might have been examined to the same point upon interrogatories, and would have been compelled to answer.

Before EVANS, J., at Chester, Spring Term, 1839.

THE report of this case, by his honor, the presiding judge, is as follows:

"This was a summary process, to recover the amount of a note

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signed by Slead and Crowder. The plaintiff alleged he was security for Crowder, and he had paid the note. A judgment had been recovered against both Crowder and Slead; and Slead had paid the money. The only evidence offered on the question of securityship was the statement made by Brannan to the witness; that he knew the note was given for articles bought by Crowder at Mr. Ingram's sale, and that Slead was security. I did not think this liable to the exception in *Ciples v. adm'r of Alexander*, (2 Tread. 767,) that the administrator could not charge the estate by his admissions. It was not the creation of a debt, but it was the statement of a fact within his knowledge, and which he could have been compelled to prove, if he had not been a party to this suit. The defendant's counsel were not satisfied with my decision; and their notice of appeal is annexed to this report."

Because the presiding judge erred in receiving the admissions of the administrator to make the estate of his intestate liable.

CURIA, per EVANS, J. I thought at the trial, and still think, that this case bears no resemblance to the case of *Ciples v. adm'r of Alexander*, (2 Tread. 767.) That case decides that the admission of the administrator, that the account was just, did not dispense with the necessity of the plaintiff's adducing the ordinary proof to establish his demand; and the reason assigned in the opinion of the court is, that there is no privity between them. The administrator's connexion with the intestate, does not necessarily enable him to know whether the account be just or not. This case depends entirely on a different principle. It is the declaration of the administrator as to a fact within his own knowledge, and which he could be compelled to prove, if he were not a party to the suit. By the rule of court, in the process jurisdiction, the plaintiff may call on the defendant to answer, on oath, to interrogatories. Now, if Slead, the plaintiff, had called on the defendant to answer on oath, whether the demand he had sued for, was not just, then the case would be like that of *Ciples v. Alexander* and *Wright v. Wright*, to be found in Rice's Dig., vol. 1, p. 323, and quoted from Brevard's MS. Rep. But if he had called on him to answer, whe-

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ther the note was not given for articles purchased by Crowder ; and whether he did not know that Crowder was the principal, and Slead the security, can there be any doubt that he would have been compelled to answer, and that the answer would have proved the fact ? Or if a bill of discovery had been filed for the same purpose in equity, would not the answer, admitting the fact, be received as evidence ? It strikes me there could be no doubt on these points ; and if the answer would be evidence, I can see no reason why his admission of the truth of the fact is not admissible to be proved. The general rule is clear, that the admission of a party on the record is evidence, and the reasons of none of the exceptions apply to this case.

I think the circuit decision was right, and the motion is dismissed.

RICHARDSON, O'NEALL, BUTLER and EARLE, Justices, concurred.

Eaves & Thompson, for the motion.

JOHN TAGGART (late Sheriff of Abbeville) v. ROBERT HUTSON.

The Fee Bill of 1827, (Acts of 1827, p. 57,) provides that the sheriff "shall be entitled to charge for conveying prisoners from one district to another, for every mile, going and returning, *in addition to all necessary charges*, 6 cents per mile." These charges in the usual administration of justice, are not to be paid by the State, unless the defendant should be acquitted, or be unable to pay the same. But the conveying of a prisoner under *habeas corpus*, from one district to another, is not in the usual administration of justice ; when done at the instance of the prisoner, whether he be acquitted or convicted, he is bound to pay all *legal and proper charges* in that behalf.

By the words, in *addition to all necessary charges*, it is meant, that the sheriff may charge for all expenses which are necessary, in order to enable him properly and safely to convey the prisoner. Under this interpretation, not only the *money paid* by the sheriff for his own support and

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that of the prisoner in going to and returning from the place to which the prisoner is conveyed under a habeas corpus issued at his instance, but also horse hire and the hire of a guard.

The legislature have *regulated* the number of the *guard* to be employed by the sheriff in the removal of prisoners, and the charges of the sheriff in this behalf, when chargeable to the State; and when the prisoner is conveyed at his own instance, he is bound to pay the same charges which the State might be compelled to pay, if he was conveyed at her instance.

Before RICHARDSON, J., at Abbeville, Spring Term, 1839.

THIS was a summary process, for fees due to, and expenses incurred by the plaintiff, as sheriff, on a habeas corpus, sued out by the defendant. The report of the presiding judge is as follows:

"J. Taggart was sheriff of Abbeville district, and had in his custody Robert Hutson, the defendant. The defendant sued out a writ of habeas corpus, and was carried before justices. He sued out the same writ, and was carried to Columbia, one hundred miles—was remanded in both instances; and afterwards tried and acquitted. Taggart then sued defendant on the following bill of particulars, to wit:

For carrying defendant before judges twice,	\$2 00
To mileage to and from Columbia,	12 00
Horse hire, \$4 00; hire of a guard, \$15 00,	19 00
For money necessarily expended on the road, and at Columbia,	54 26

I considered the sheriff entitled to charge, under the fee bill of 1827, as follows:

1. For carrying the defendant to the judges, each time, \$1 00—allowed by act, \$2 00
2. For carrying him 100 miles and back, 12 00
3. For his dieting and lodging on the way, the money expended by the sheriff, 54 00

These are "the necessary expenditures" of the act; but not entitled to horse hire, \$4 00—that is included in the carrying defendant; and not entitled to any hire of a guard, \$15 00—the

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defendant is not to pay the price of his custody. These two last charges are, therefore, disallowed, and the decree given for \$—."

The defendant appealed, and now moved to reverse the decree of the presiding judge, so far as the defendant is charged with mileage and expenses.

The plaintiff also appealed, and moved to reverse the decree, so far as it rejects the charges for horse hire and hire of a guard.

CURIA, per O'NEALL, J. The liability of the defendant to the demand of the plaintiff, so far as it is contested, depends upon the construction of the act of 1827, (acts of 1827, p. 57.) It provides that the sheriff shall be entitled to charge "for conveying prisoners from one district to another, for every mile going and returning in addition to all necessary charges, six cents per mile." These charges, in the usual administration of justice, are not to be paid by the State, unless the defendant should be acquitted, or be unable to pay the same. But the conveying of a prisoner under habeas corpus from one district to another, is not in the usual administration of justice. It is done at the instance of the prisoner, and for his benefit alone; and it hence follows, that whether acquitted or convicted, he must pay all legal and proper charges in that behalf. What is meant by the words, "in addition to all necessary charges?" It seems to me, that by the plainest rule of interpretation, the ordinary and usual import of the words, it means that the sheriff may charge for all expenses which are necessary, in order to enable him, properly and safely, to convey the prisoner. For these are necessary charges. Under this interpretation, not only the money paid for the support of the sheriff and the prisoner, in going to and returning from Columbia, is covered, but also the horse hire and the hire of a guard. The horse was necessary to carry the prisoner, and the guard was also necessary for his safe keeping. In relation to the guard, it may be remarked, that the legislature have regulated the number to be employed, and the charges of the sheriff in this behalf, are constantly allowed, and paid in the contingent accounts. This shows that the legislature regard as proper, that the sheriff should employ a guard in con-

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veying a prisoner from one district to another, and hence, I think, it follows, when he is conveyed at his own instance, he must pay the same charges which the State might be compelled to pay, if he was conveyed at her instance.

The motion on the part of the defendant is dismissed; that on the part of the plaintiff is granted.

EVANS, EARLE and BUTLER, Justices, concurred.

Wardlaw & Perrin, for the plaintiff.

Burt & Thompson, for the defendant.

JOHN SITTON v. JOHN FARR.

Action for Malicious Prosecution—verdict for plaintiff—motion in arrest of Judgment. The declaration set out, “that the defendant falsely, maliciously and without any reasonable or probable cause, made the information, charging the plaintiff with the commission of perjury; the issuing of the warrant, the arrest, imprisonment and enlargement of the plaintiff, on his recognizance to appear at the next Court of Sessions for Pickens district, to answer the said charge,” and then states, “that on the 9th of October, 1837, the defendant not having any proof whereby to sustain the said charge made by him against the said plaintiff, the prosecution for the supposed offence aforesaid failed, and the said plaintiff was fully and freely discharged by *the said court*, and then, as now, the said prosecution for the said supposed offence was, and is, wholly at an end.” Held sufficient, and the motion refused.

The omission to state the fact specially, that the bill of indictment went to the grand jury, and that they ignored it, is immaterial, for, legally speaking, until the grand jury find the indictment, it is as if none had existed. The fact, in this respect, is sufficiently stated, by setting out that “the defendant not having any proof whereby to sustain the said indictment,” &c.: for the “no bill,” by the grand jury is, in fact, saying there was no proof to sustain the charge.

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Before O'NEALL, J., at Greenville, Spring Term, 1839.

The following is the report of his honor, the presiding judge :

" This was an action of malicious prosecution. The defendant had set on foot a prosecution against the plaintiff for perjury, in swearing before a justice of the peace, on a trial before him, that the defendant was justly indebted to him in the sum of \$5 93 $\frac{3}{4}$, after all just credits were allowed, when the plaintiff immediately after the said trial, paid the defendant \$1 25 or \$1 50 for a barrel. Upon this charge an indictment was preferred, and the grand jury found "no bill," and therefore, the plaintiff was discharged by the court. The proof, I thought, abundantly showed the want of probable cause, as will appear satisfactorily, from the following summary of the evidence. The defendant sued the plaintiff before Esquire Robinson, for a settlement ; at the return of the summons, the parties met. The defendant not being a good accountant, a Mr. Crawford was appointed by the magistrate, to state his accounts. While the parties and Mr. Crawford were engaged in this business, something was said by the defendant, about a barrel lent to the plaintiff, and by the plaintiff, about a frow lent to the defendant. At the suggestion of the justice, the borrowed articles were to be returned, and not brought into the account. When the defendant's account had been prepared by the accountant, the parties came before the justice, when the plaintiff, at first, refused to produce his account, but on the oath being tendered to the defendant, the plaintiff then produced his account, and swore that the defendant was indebted to him \$5 93 $\frac{3}{4}$, after allowing all just credits. For this sum the justice gave judgment against the defendant, when some one exclaimed, " you have lost your barrel : " he said " yes : " demanded a summons from the justice, which he was about to grant, when the plaintiff paid the defendant for the barrel, deducting therefrom the price of the frow. One of the defendant's credits was for a beef, which the plaintiff had credited at 3 $\frac{1}{2}$ cents per lb. ; the defendant claimed that the plaintiff was to have allowed him 4 cents per lb. : the justice said he told Farr

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that he thought 3½ cents was a very fair allowance, and that, I supposed, disposed of that item: and, in my remarks to the jury, I said to them that the amount of the credit for the beef, did not seem to be in issue between the parties, when the plaintiff swore to the balance of his account. After I had closed my charge, General Thompson said to me, that Elsy Hunt, one of the witnesses, had said, on his examination, that this item was in contest between the parties, when the plaintiff was sworn. I had no recollection of any such proof, nor did my notes afford any memorandum of it. I did not permit the witness to state any thing on the matter after my charge. It was proved by the Messrs. Maulden, that the plaintiff was to allow 4 cents for the beef; another witness, Mr. Turner, very distinctly proved, that it was not worth more than 3 cents.

There was a great deal of testimony as to the character of the plaintiff. It was about as follows: Col. Grisham knew the plaintiff for twenty years: they lived in the same village ten or twelve years: he gave him a good character: after the plaintiff removed from Pendleton they lived twenty miles apart, but he still knew the plaintiff, and was frequently at his house. Col. Norton lives twenty-five miles from the plaintiff: had known him for twenty years, and he gave him a good character. Gen. Whitner said, the plaintiff's character, years ago, was good at Pendleton. Richard Burdine said, he knew the plaintiff from his infancy, that the opinion of the people about the plaintiff was divided, some thought his character good, others bad: he said the plaintiff had mills, and it was of his dealings with people in that respect, that there was complaint. Some of the men who spoke badly of the plaintiff were bad men; others were good men. He said there was too much bad against him. Francis Maulden, who had lived with the plaintiff, said his character was good. Simeon Wade said, that a majority of the people thought his character good. Esquire Robison said his character was tolerable. Mr. Robison had lived with the plaintiff, he said he knew nothing against him. Mr. Bowen said that the people were divided about the plaintiff's character, some thought it bad. This was the testimony also, of

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Harris Maulden, Col. Hoke and Mr. Burdine, jr. Elsey Hunt and Col. John P. Ligon said his character was bad. Major Masten said that the people near the plaintiff said he was too tight in his bills; they did not get from his saw mills all the plank they ought to have. He had, however, always found him fair. Esquire Watson said that the people said, the plaintiff was shuffling in his settlements. The leading counsel for the defendant (Gen. Thompson) announced, after examining Elsey Hunt, Harris Maulden, Mr. Turner, Col. Hoke, Major Masten, Mr. Burdine, Colonel John P. Ligon and Esquire Watson, that the defendant had closed his defence: the plaintiff was called on for his reply, and said he had none: the case was considered closed in evidence on both sides; I had discharged the jury for dinner, and was in the act of leaving the bench, when Mr. Townes said, the defendant would wish to examine other witnesses after dinner, without pointing out any matter making it proper that further proof should be heard. Mr. Perry objected to any further examination, and I said to Mr. Townes, it could not be done. There the matter rested. If he had said that he or his colleague had inadvertently omitted to prove a fact; or had pointed out the materiality of his witnesses, in the exercise of a sound discretion, I would have permitted the defendant to have examined other witnesses. But I supposed, that it was merely to gratify his client, that other witnesses were proposed to be examined, as to character; and about that I was sure he had an abundance.

I instructed the jury that the action of malicious prosecution lay, whenever any one without any reasonable or probable cause, sets on foot a criminal prosecution; that the absence of probable cause created a legal implication of malice. It was, therefore, necessary to understand what was probable cause. I defined it to be, "any thing which creates a belief in the mind of a reasonable man of the truth of the charge." The action, I told them, was generally not to be encouraged. The plaintiff's case must therefore, be free from doubt, on the question of want of probable cause, before he could recover.

I arrayed the facts, showing a want of, or the existence of pro-

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bable cause, and submitted the question to them, expressing a very distinct opinion, that in the matter of which the perjury was assigned, there was nothing like a wilful false oath.

I commented on the proof of character ; and might have said to the jury, that the evidence of Cols. Norton and Grisham, who lived twenty miles from the plaintiff, was entitled to as much consideration as that of any other witnesses. Their acquaintance was a long one, and, in some respects, an intimate one. Both of them were very intelligent men, and both of them had been much before the public, and had, therefore, pretty good opportunities to know the plaintiff.

I said to the jury, in conclusion, if there was no probable cause for the charge, and yet the plaintiff's character was so bad, that it could not be much injured by such a charge, then, that the plaintiff ought not to recover damages, beyond those which he had actually sustained. This was (I should think) instruction in favor of, and not against the defendant, and ought not to be a ground of exception on his part.

As to the ground in arrest of judgment, I know nothing. The record was not brought to my view, either on the trial or since."

The jury found for the plaintiff, \$250 damages.

The defendant appealed, and now moved in arrest of judgment, because the plaintiff failed to allege in his declaration the manner in which the plaintiff was discharged, in the prosecution for perjury upon which this action is predicated, and for a new trial, on the following grounds :

1. Because the judge refused to allow the defendant to examine some of his most material witnesses, for the reason that one of his counsel said (inadvertently) that he had closed the evidence, which counsel was unacquainted with the relative importance of the witnesses, and had nothing to do with the preparation of the case, as had the other counsel of defendant, who immediately stated a wish to examine other witnesses, and was refused.

2. Because the judge charged that there was nothing like a direct issue upon the price of a certain amount of beef, which the plaintiff swore, in the trial before the magistrate, upon which the indictment was founded, to be less than the price stipulated by agree-

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ment between him and the defendant; and because the judge charged that there was no false swearing on this point, and nothing showing probable cause.

3. Because the judge erred in saying to the jury that they ought to find some amount for the plaintiff, (to wit) enough to pay his reasonable expenses.

4. Because the judge erred in refusing the defendant the liberty of correcting a very material error in his notes of evidence, read to the jury, when the witness was in court.

5. Because the judge directed the jury to attach as much importance to the evidence of two witnesses on character, who lived twenty miles distant from plaintiff's residence, as to the evidence of equally respectable men, who lived in his immediate neighborhood.

6. Because the jury found contrary to evidence.

CURIA, per O'NEALL, J. The grounds for new trial require no comment. The ground in arrest of judgment will be briefly considered. The declaration sets out, that the defendant falsely, maliciously, and without any reasonable or probable cause, made the information, charging the plaintiff with the commission of perjury: the issuing of the warrant, the arrest, imprisonment and enlargement of the plaintiff, on his recognizance to appear at the next Court of Sessions for Pickens district, to answer to the said charge, and then states, that on the 9th of October, 1837, "the defendant not having any proof whereby to sustain the said charge made by him against the said plaintiff, the prosecution for the supposed offence aforesaid, failed, and the said plaintiff was fully and freely discharged by the said court, and then, as now, the said prosecution for the said supposed offence aforesaid, was, and is, wholly at an end." The question here, is not, whether this declaration is as technically prepared as it might have been, but whether to entitle the plaintiff, on this verdict, to judgment, it was necessary to state in the declaration the manner in which he was discharged from the prosecution? In cases of this kind, it is, in general, advisable to set out all the proceedings had in the prosecution; but,

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because this is more lawyer-like, and is above exception, it does not follow, that, in some cases, a general description may not suffice. In this case, the manner of the defendant's discharge is sufficiently set out: he was discharged by the order of the court: this is described by the words, "the said plaintiff was fully and freely discharged by the said court." So that, confining ourselves to this ground, we should have to conclude that, upon it, there was no doubt. But I suppose the defendant intended to contend that, the cause of action stated in the declaration, was not sufficient to entitle the plaintiff to recover. In this, however, he is mistaken. The plaintiff has stated, that a prosecution, without any reasonable or probable cause, was maliciously set on foot against him, by the defendant, which failed, for the want of proof; and that he was therefrom discharged, and that it was at an end. This statement unquestionably makes out a legal cause of action. It is, according to every definition, the description of a malicious prosecution. In 2 Sel. 1060, it is said, "the declaration must state all the material circumstances attending the malicious prosecution; and how it was disposed of." This is done on the present occasion, in stating, 1st, the information; 2d, the warrant; 3d, the arrest and imprisonment; 4th, the recognizance to appear and answer; 5th, the discharge by the court, and the consequent ending of the prosecution. The only circumstance omitted is, that the bill of indictment went to the grand jury, and that they ignored it. But this is immaterial; for, legally speaking, until the grand jury find the indictment, it is as if none had existed. The fact, in this respect, is sufficiently stated, by setting out that "the defendant not having any proof whereby to sustain the said indictment, &c.;" for the "no bill," by the grand jury, is in fact, saying there is no proof to sustain the charge.

The motions in arrest of judgment, and for a new trial, are dismissed.

EVANS, EARLE, and BUTLER, Justices, concurred.

Thompson & Townes, for the motion.

B. F. Perry, contra.

Hall v. Howard.

WILLIAM HALL v. The Adm'rs. of JOHN HOWARD.

John Howard, the defendant's intestate, shortly before his death, with a view to a partial disposition of his effects and making some provision for the plaintiff, who had married his natural daughter, executed and delivered to the plaintiff the following note: "At my death, I promise to pay, or cause my administrators or executors to pay, to William Hall, or to his heirs, the sum of five hundred dollars, for value received; witness my hand and seal, this 12th January, 1837." The note was signed in the presence of two witnesses, who subscribed their names as witnesses to the note. HELD, that as a promissory note it was without consideration, a mere naked revocable promise, and void.

The delivery of a note by a party in his last illness, by which the maker "at his death promises to pay, or cause his executors or administrators to pay, a certain sum of money, to the payee or his heirs," creates no obligation on the part of the maker, or his representatives, after his death, and cannot be supported or enforced as a *donatio causa mortis*, of the money mentioned in the note.

To constitute a valid gift either *inter vivos*, or *causa mortis*, the donee must have an *immediate* right to the dominion of the *chattel given*; in the latter case defeasible on the recovery of the donor.

Quere.—Under the spirit of the law of this State, which requires three witnesses to a will of *personal*, as well as of real property, how far are donations *causa mortis*, to be countenanced by our courts?

Before RICHARDSON, J., at Lexington, Spring Term, 1839.

THE following is the report of this case, by his honor the presiding judge: "This was an action on a note of hand for \$500 in the following words, to wit:

"At my death I promise to pay, or cause my administrators or executors to pay, to William Hall, or to his heirs, the sum of five hundred dollars, for value received. Witness my hand and seal, this 12th of January, 1837:

Test: MICHAEL LIVINGSTON.
ISRAEL GAUNTT, Jr.'

his
JOHN × HOWARD.
mark.

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Michael Livingston stated, that William Hall, the payee, came for him to draw the will of John Howard. Howard was ill, having been badly burnt. It appeared to be disagreeable to his family that his will should be made. Howard then asked what the witnesses thought of his signing notes, instead of a will. Witness replied, notes would do as well: He drew the note in question, and another for the same amount to a child. Howard then signed both notes, by his mark, because his hand was disabled: Livingston and Gauntt put their names as witnesses: He saw no delivery of the note: It lay on the table, and Livingston went away. Howard lived a week after, and never got well. The witness supposed he meant a gift of the notes. Mrs. Hall was his natural daughter. Howard had a wife and a child or two. Mr. Fort proved that the personal estate of Howard amounted to \$4804, and Mr. Addison stated that his real estate (over and above his widow's share) sold for \$1100. The question submitted was, whether the note could be recovered as a *donatio causa mortis*? I charged the jury, that although the note was given without any pecuniary consideration, yet being made and given in the last illness of Howard, in contemplation of death, it was competent for the payee to recover.—(See the case of *Wright v. Wright*, 1 Cow. 393; 1 P. Wms. 441; Bayl. 348; *Grimke's ex'ors.* 79.) I thought the law well and fully adjudged, for such a case, provided there had been in point of fact, a gift and actual delivery of the note to the payee. That the delivery was the essential fact in all gifts, and made them valid and effectual; of this fact the jury must be first satisfied, before they could give the payee a verdict. I observed, that the only evidence of a delivery in this case, was the actual possession of the note by Hall; that such possession of a note was, in ordinary business transactions, sufficient proof of a delivery. But I questioned much whether it was sufficient evidence of the delivery in such a case of mere gift. But the jury were to decide upon the evidence: and to find accordingly. The note was binding on the administrators if there had been a free gift, in contemplation of death, perfected by actual delivery; but not otherwise. The jury returned a verdict for the amount of the note."

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The defendants appealed upon the following grounds:

1. Because his honor the presiding judge, erred in charging the jury, that the note on which the action was brought, although without consideration, was a good note, it being given in the maker's last illness.

2. Because his honor erred in charging the jury that the production of the note in court, might be sufficient evidence of delivery, although no evidence had been given of its delivery.

3. Because the jury found for the plaintiff, although there was no evidence of delivery.

4. Because the verdict of the jury was contrary to law and evidence.

CURIA, per BUTLER, J. Although the evidence is not satisfactory on the point, we must assume from the finding of the jury, properly instructed, that the note on which this action is brought, was duly delivered to the plaintiff by the intestate, in his life time; which does not, however, preclude the main question, whether it imposes any obligation on the defendants to pay it. The note contains no condition, that the alleged gift of it, was defeasible on the recovery of the donor. It is absolute in its terms, and but for the evidence, which explained the circumstances under which it was given, it would be regarded as any other note for the payment of money. It appeared however, very clearly, that the intestate entered into a voluntary obligation, that his administrators, after his death, should pay plaintiff \$500. It was a bona fide attempt to give the plaintiff that much money, without making a will. And these questions arise—is it valid as a promissory note, for good consideration? or as a gift of so much money *causa mortis*? Regarding it in the first point of view, the authorities are entirely satisfactory that it cannot be sustained as a good note. It is without valid consideration: a naked revocable promise. In the case of Pearson v. Pearson, 7 Johns. R. 26, it was held that a parol promise to pay money, as a gift, was no more a ground of action, than a promise to deliver a chattel as a gift. Upon the authority of this case, the case of Fink v. Cox, 18 J., 145, was decided. The last

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case was different from the first, in this, that it was brought on a voluntary note, payable by the intestate of defendant, to his son, sixty days after date. It was negotiable, being payable to order, and therefore transferable by the son. It was strongly contended that the son, the plaintiff, had a vested right in the note, as he could have transferred it, and thus have made it good—and that it was supported by the consideration of blood. Yet the court said that there was no case where a personal action had been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, and natural love and affection, had been held sufficient. The case which we have under consideration, is in no wise distinguishable from the above, except that the obligation is not negotiable, and was to be paid after the death of the promisor. It is executory and without consideration—and what is more, the payee could not have realized any benefit from it at the time of its execution, by transferring it to another—which restricts and controls the paper so far as to leave it entirely at the option of the maker, or his representatives, to pay it or not. In other words, it never could have been enforceable against them, by a third person. As a promise then, absolutely made, *inter vivos*, it was utterly void.

Can it be placed on a better footing, by considering it a *donatio causa mortis*? On the contrary, I think this view of it would put it in a worse situation. Courts have been jealously distrustful of such gifts. They are too frequently extorted by fraud, from the infirmities of dying men; or after their death, sustained by combination and perjury. They have been sometimes established, upon full proof, in derogation of a valid will. Our law is different from that of England and other States of the Union, so far as I am informed, as it requires three witnesses to a will of personal property. Its provisions are founded on the presumption, that the facility of a sick bed may be taken advantage of. In consulting the spirit of the law, we are well warranted in discountenancing all donations *causa mortis*. I do not undertake to say that such gifts may not be made, provided the thing intended to be given is capable of delivery, and has been delivered either by actual tradition or by

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written title. To constitute a valid gift, either *inter vivos* or *causa mortis*, the donee must have an immediate right to the dominion of the chattel; in the latter case defeasible, on the recovery of the donor. Where the corpus of the thing is put in his possession by delivery, his dominion is complete, and his title is as good against the donor as any one else. The same conclusion follows where the thing is not present, but a deed for it is delivered to the donee. The deed gives him a right to take under his dominion the thing described. The donor cannot dispute his right. Where the chattel is a slave, a horse, or a cow, there can be little difficulty. I have no doubt that money may also be the subject of such gift: as when it is in a box, or bag, and has specific identity. I think this may be regarded as a tolerable test. In all cases where the donee could assert and successfully maintain his title, in an action of trover to the thing given, the gift would be good in law. Apply this test to the case under consideration: Could the plaintiff have maintained his action of trover for the money intended to have been secured by the note. It is more than probable that at the time the note was signed, the intestate had not so much money in his house. The money was probably to be raised by the sale of his estate after his death. How then could the plaintiff have had a dominion, or a right of dominion, over any money.—A promise to deliver a thing, is inconsistent with the delivery of the thing itself, or its title, which in effect is the same. I cannot perceive myself how this case, in principle, can be distinguished from those of *Pearson v. Pearson*, and *Fink v. Cox*. When resolved into its true character, it is a naked promise, either to pay or deliver money, after the death of the intestate; having some of the ingredients, but wanting the validity of a testamentary paper. It was on the part of the intestate, a *bona fide*, but impotent attempt to make a will, and can confer no right. The case of *Wright v. Wright*, 1 Cow. 590, has been mainly relied on to sustain this action. That case is certainly in point, but it seems to me not to be founded in principle, and has no authority to sustain it. It stands alone on the authority of the judges who pronounced the judgment. It is so much opposed to the general principles of law and to the tenor and spirit

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of our law especially, that it cannot receive the sanction of this court. Whether a chose in action may be the subject of a valid gift, where the demand is due to the alleged donor from a third person, is a question which is not fairly involved in this case.—The doctrine on the subject is fully and ably discussed by Lord Hardwicke, in the case of *Ward v. Turner*, 2 Ves. Sen. 431; and by Lord Loughborough, in the case of *Tate v. Hilbert*, 2 Ves. Jr. 111. In the first case it was held, that to make a good gift *causa mortis*, there must be an actual delivery of the specific thing; in the other, this general doctrine was qualified, by holding that a deed in writing would be equivalent to a delivery, and would confer a title. From both cases, I think it may be well inferred, that if the thing given be a *chose in action*, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed before the donee could take. The general doctrine on this subject cannot affect the case before the court, further than to show that where the donor has secured any control in himself, or has omitted to give, by valid transfer, the entire dominion to another, the law will not support the transfer as a gift either *inter vivos*, or *causa mortis*.

From the views which I have taken, the defendant must have a new trial, which in effect will authorize the succeeding judge to grant a nonsuit.

RICHARDSON, O'NEALL, EVANS, and EARLE, Justices, concurred.

Boozer & Fair, for the motion.

Gregg & Caldwell, contra.

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RICHARD SMITH v. BENJAMIN MITCHELL.

Action of assumpsit. Plea statute of limitations. Replication that defendant was out of the State at the time the cause of action accrued against him, and that the suit was brought within two years after the defendant's return to the State. The judge below nonsuited the plaintiff on the ground, that his cause of action was barred by the statute, there being no saving in the statute as to absent defendants. Nonsuit set aside and new trial granted. (The judges all concurring in granting a new trial, but delivering separate opinions.)

Although our act of limitations of 1712, (P. L. 102,) requires all actions of account, upon the case, &c., to be brought "within four years next after the cause of such actions, or suits, and not after; and contains in itself no express saving, or exception, as to causes against persons out of the State, at the time such causes of action may accrue against them; yet upon the construction of the whole act, HELD that when such a cause of action accrues to a plaintiff, resident in this State, against a party residing out of the State at the time, the statute does not begin to run until his return within the jurisdiction of the courts of this State. (Per RICHARDSON, J., in delivering the opinion of the court.—BUTLER, J., concurring.)

By the stat. 4 Ann, Ch. 16. s. 19, (P. L. 96,) it is enacted, "That if any persons against whom there is, or shall be, any such suit or cause of action, &c., (*action of account, or upon the case, &c.*) he or she shall be at the time of any such cause of suit, &c., given or accrued, &c., *beyond the seas*, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before, by this act, and by the said other act, made in the twenty-first year of the reign of James the first." The statute of Anne was enacted in 1705, and was made of force contemporaneously with the passage of our act of limitations of 1712, which last act was copied from and substituted, with alterations, for that of the twenty-first year of James the first. HELD, that although the saving as to parties beyond seas, in the statute of Ann, is referable *in terms*, only to that statute and the statute of the twenty-first year of James the first; yet by a fair and liberal construction, it may be considered as applicable to the act of limitations of 1712. (Per RICHARDSON, J., in delivering the opinion of the court.—BUTLER, J., concurring.)

Our statute of limitations was passed on the twelfth day of December, 1712, and the act for declaring of force certain English statutes, was passed on

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the same day. Among the statutes declared of force, is the statute 4 Anne, c. 16.—By the nineteenth section of that statute, it is declared in substance, that if the defendant, when the cause of action accrued, be beyond seas, he may be sued after his return, within the time fixed by the statute of the twenty-first year of James I., which is six years. The statute of James is not of force, and the time allowed for bringing actions of assumpsit by our act, is only *four* years. In every other respect, there is no repugnancy between our act of 1712, and the nineteenth section of the statute of the fourth year of Anne, c. 16. As they were both declared to be the law of this State on the same day, they must be regarded as parts of one system, and construed together, so far as they are consistent. The action in this case was brought within two years after the defendant's return to the State, and the question whether he is allowed four or six years, does not arise. (Per EVANS, J.—EARLE and O'NEALL, Js., concurring.)

Before O'NEALL, J., at Sumter, Fall Term, 1837.

THE report of his honor the presiding judge, is as follows :

“This was an action of assumpsit to recover money paid by the plaintiff, as the bail of the defendant. The money had been paid nearly twenty years before action brought. The defendant before the payment was made, went out of the State, and continued to reside without it until within about two years before action brought. The statute of limitations was pleaded. I thought that it constituted a bar to the plaintiff's recovery. There is no saving in our act of limitations, where the defendant is out of the State. The bar is complete in four years next after the cause of action given or accrued. In the case of Coe, adm'r. of Turpin, v. Vanlew & Higgins, the defendants were sued on a bond. Immediately after giving it, and before due, they left the State of Maryland, where it was executed, and came to South-Carolina, and resided here until sued. A period of more than twenty years intervened, and the court held, against two successive verdicts for the plaintiff, that the debt was in law to be regarded as paid, from lapse of time. On stating my views to the plaintiff's counsel, they submitted to a nonsuit, with leave to move to set it aside.”

The plaintiff now moved to set aside the nonsuit, and for a new trial, upon the ground, that the defendant having been out of the

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State when the cause of action accrued, and having so continued until within two years before action brought, the statute of limitations constitutes no bar.

CURIA, per RICHARDSON, J. This was an action on a count for money paid by the plaintiff, Smith, for the defendant, Mitchell, as bail. The question arising in the case is, whether the debtor by going from the State before the money was so paid on his account, and by staying out of the jurisdiction for four years thereafter, can thus elude the action, and afterwards plead such lapse of time in bar of his creditor's final recovery of the debt? Our act of limitations of 1712, (P. L. 102, sec. 6,) requires actions of account, on the case, &c., to be brought, in the language of the act, "within four years next after the cause of such actions, or suits, and not after." This limitation is without any reservation, saving, or exception, expressed in the act, where the debtor is out of the State, at the time the cause of action first accrued. Nor is there, in terms, any extension of the time, when the debtor dies before or after the cause of action, nor where he promises to pay a former debt. In such cases, the limitation has been postponed by judicial decision, not upon the expressed reservations of the act, but by the construction and intendment of the whole law of limitations. In the instance before us, the debtor by absenting himself, put it out of the power of his creditor to sue, until within two years before the action was brought. At no time before Mitchell's return could Smith have sued him in this State: because no writ could have been served upon his person. Did then the four years, necessary to form the bar, begin to run from the time the money was paid, or from the return of Mitchell to the State, so as to be practically sued by Smith in our own jurisdiction? If the debtor could in such way elude the possibility of any action for the four years required, and then set up the time so gained by himself in bar of the action, frauds might be easily practised. But on the other hand, do not the terms of the act, "within four years and not after," form a conclusive bar to the recovery, notwithstanding? There is difficulty in reconciling such prohibitory terms to just principles, and the

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means of preventing the fraudulent circumvention apprehended. Are we, then, to consider the negative terms of the act as forming a technical rule, to be enforced literally : or as furnishing a rational rule of action, which requires the principles essential to its subject matter to be carried out by construction ?

1. The statute of limitations is a great remedial enactment. It alters the common law by introducing many limitations to the right of action in named cases. The object of the act is to secure and quiet men in their estates and possessions ; and one means of doing so, is by obliging creditors to demand their debts within a reasonable time, under the penalty of losing the right of action, in case of their neglect to sue within the prescribed time. The debt is not abolished—it is the remedy in the judicial forum that is denied, by reason of the creditor's default. But shall we put such a construction as to make the act derogate from our principles, and require of the creditor an impossible condition, or to forfeit his right of action ? The act allows four years, within which the creditor may sue at his own discretion. But in this case, Smith could not have the opportunity of suing, contemplated by the act—the neglect of which opportunity is the cause of his forfeiting the right to sue, and is of course the material cause of the statutory bar. The action was eluded by Mitchell during the entire time of the four years allowed.—And shall we divest the law of its sense and justice, by disregarding the very condition, (neglect,) which should cause the creditor to lose his remedy ? I cannot attach such force and importance to the mere general phraseology of the act. It is not a plain instance of “*ita lex scripta est*,” which if plain, should be imperative. And I will add, that this is as strong a case, as that of a debtor dying before the cause of action accrued : which by fair construction has always suspended the limitation, (3 M'Cord. 455, 4 M'Cord. 423,)—there is the same cause for suspending it in this case as in that—the impossibility of suing is the same. But let us consider another general principle for the construction of statutes.

2. When the statute is in derogation of the common law, without annulling the whole principle, we are not to carry the act beyond its strict enactments to that effect ; and the general principle

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still stands, as modified and altered. At common law there was no limitation in the time of actions (as is still the case, in debts under seal,) and we are not to carry the limitations prescribed, beyond the statutory modifications. We must, then, construe the literal enactments of our limitation act, so as to preserve the principles and reasons of the common law, as far as they are left unaltered by the act. "Within four years next, after the cause of such actions," must mean a prescribed time; in the course of which, the creditor might have sued the debtor, as at common law—that is, within our own jurisdiction. The whole idea must be preserved, as the true exponent of the limitation, and is the essential condition of the bar, if we respect the principle just laid down; and the additional terms, "not after," cannot alter this construction. Now, then, although the debt had been due more than four years before the action; yet Smith could not sue, before Mitchell came within the reach of our judicial process, and when such creditor is without default, the debtor cannot make up the bar, by withdrawing his person from the forum; before which, the act requires the creditor to sue, or lose his right of action. I have endeavored to place the decision of the case, upon the proper construction of the limitation act of 1712; because I think that act ought to be considered as a series of enactments, predicated upon rational principles, the end of which must be kept in view, and their justice preserved; and would, whenever the terms of the act admit of such a construction, carry out, and digest its principles, into a uniform system. But I may well add, that by the statute of 4 Anne, c. 16, sec. 19, (P. L. 96,) it is enacted, &c.: "That if any person, or persons, against whom there is, or shall be any such suit, or cause of action, &c., "(action of account, or upon the case, &c.) he or she shall be, at the time of any such cause of suit, &c. "given, or accrued, &c.;" "beyond the seas," that then such person, or persons, who is, or shall be, entitled to any such suit, or action, shall be at liberty to bring the said actions against such person, or persons, after their return from beyond the seas, so as they take the same, after their return from beyond the seas, within such times, as are respectively limited, for the bringing of

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said actions, before by this act, and by the said other act, made in the twenty-first year of the reign of king James the first." This statute was made of force contemporaneously with our act of 1712, and still its reservation, it is true, is referable in terms only, to the statute of the 4th year of Anne, and to that of the twenty-first year of James the first. But notwithstanding this restriction, yet by a liberal construction, it may embrace the case before the court, as a law, made in *pari materia* with our act of 1712, which was passed seven years after that of the 4th year of Anne, and which was copied from and substituted with alterations, for that of the twenty-first year of James the first, the British statute of limitations. At all events, the statute of Anne, which is still of force, recognizes the principle upon which our decision turns.—And I can perceive no sufficient reason for concluding that our act of 1712, by its silence on that head, meant either to repeal the reservation or to avoid so essential a principle of justice. This would seem left open to fair construction. The direct expression of that reservation would seem to have been omitted, because it was assumed as a principle that belonged to the subject matter. Without such assumption, I know not how we could justify the adjudications noticed in my argument. For the terms, "within four years after the cause of action, or suit, and not after," apply equally to all our adjudications where the debtor has acknowledged the debt anew, or has departed this life.—And it is only by the same reasonable interpretation that we postpone the limitation, so expressed, in all such cases.—And I cannot but suspect that the supposed difference between such adjudications and the case now before us, may be found merely in the fact, that acts of limitations have generally had an express provision, (like the stat. of Anne,) for this last case and not for the others—whereas both are omitted in our act of 1712, and each class of cases have the same reason for their support. In the first the debtor suspends the limitation by his new assumption of the debt; in the second he does so by his death; and in the last by absconding.

Wherein does the cause for suspension in the last, appear less than in the first or second? Not in the wilfulness of the abscond-

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ing debtor, assuredly—nor in the utter inability of the creditor to bring the debtor within the jurisdiction of the State, in order to sue him. They are all equal instances of just construction. The same too may be said of the application of the statute to suits in equity. Such application has no express warrant in the terms of the act; but goes upon this principle of fair construction, that the obvious intention of an act, is as good as its letter. The whole argument in the present case goes upon the same principle. The rule then, as indicated by such adjudications, and by the statute of 4 Anne, as well as by the inherent reasons of the express limitation, is, that where the creditor could by no legal possibility, bring his action at any time, by reason of the absence of his debtor, the time of limitation will not commence to run until a legal action can be practically brought against the proper debtor; or, in case of his death, against his representative. We give no opinion upon the question, whether the debt of Mitchell may not be presumed to have been paid, from the great lapse of time—that is a question of fact, not of statutory limitation: and may still arise in the case; but it will be one for the consideration of the jury, upon a principle of the common law, which presumes actual payment, or satisfaction from great length of time.—And upon that question, the case of Turpin and Higgins may, very possibly, have its bearing.

The nonsuit is set aside and a new trial awarded.

BUTLER, J., concurred with RICHARDSON, J.

EVANS, J. Our statute of limitations was passed on the twelfth day of December, 1712, and the act for declaring of force certain English statutes was passed on the same day. Among the statutes declared of force is the statute 4 Anne, c. 16. By the nineteenth section of that statute, it is declared in substance, that if the defendant when the cause of action accrued, be beyond seas, he may be sued after his return, within the time fixed by the stat. 21 James I., which is six years. The statute of James is not of force, and the time allowed for bringing actions of assumpsit, by our act, is only four years. In every other respect, there is no repugnancy be-

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tween our act of 1712, and the nineteenth section stat. 4 Anne, c. 16. As they were both declared to be the law of this State on the same day, they must be regarded as parts of one system and construed together, so far as they are consistent. The action in this case was brought within two years after the defendant's return to the State, and the question, whether he is allowed four or six years, does not arise. For these reasons, I concur in granting the motion for a new trial.

EARLE, J., concurred with EVANS, J.

O'NEALL, J. I am satisfied with the view presented by my brother EVANS, and therefore concur in it.

NOTE.—It will be observed that the *opinion of the court* in the case of *Smith v. Mitchell*, is represented as being delivered by Mr. Justice RICHARDSON. This is done in conformity with the original manuscript, signed by all the judges. The opinions delivered by the judges *seriatim*, though differing in some respects, as far as the case itself is concerned lead to the same result; and to that extent it would be unimportant to notice upon what precise points a majority of the court really did concur. But as an authority in future cases which may arise under the statute, somewhat differently circumstanced, it is perhaps important to notice, that although RICHARDSON, J., is represented as delivering the opinion of the court, yet that in fact, as far as the opinion delivered by him differs from the opinion delivered by Mr. Justice EVANS, the latter must be considered the opinion of the court; inasmuch as BUTLER, J., was the only judge who concurred *entirely* with Mr. Justice RICHARDSON, in his construction of the act: while O'NEALL and EARLE, J., concurred in the opinion delivered by Mr. Justice EVANS. It will be seen, that while RICHARDSON and BUTLER, J., held that in this case the statute of limitations of 1712, fairly construed, by itself, and independently of the statute of Anne, was no bar to the plaintiff's cause of action—EVANS, O'NEALL and EARLE, J., place their opinion *exclusively* upon the force and application of the statute of Anne to the case before the court.

In relation to the construction of the statute of limitations of 1712, as it affects *personal actions*, it may perhaps add something to the strength of the views taken of that act in the opinion delivered by Mr. Justice RICHARDSON, to advert to the case of *King v. Smith*, (ante. p. 10,) in which the court gave a very analogous construction of the same act, in regard to the action of *trespass to try title*. The clause of the act in relation to actions for lands, is as *imperative* that the action shall be brought within *five* years after the *right or title* to the same accrues, (see sec. 2. P. L. 101,) as that an action

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of account, or on the case, &c., shall be brought within *four years* from the accrual of the cause of action—and there is no exception or qualification in the statute, in one case, more than the other. Yet the court in that case recognize as the settled construction of the act in regard to actions of trespass for land, that the mere *non claim* of the owner, or the omission to sue, for the time limited by the act, creates in itself no bar to the plaintiff's recovery.—It is necessary in order to bar the plaintiff, that there should have been *some one* in possession of the land, who might have been sued. The bar of the statute is intended to be interposed only upon the assumption that the plaintiff has neglected to prosecute his claim for the time limited; it follows therefore, if no one has been in possession of the land, claiming adversely, there has been no one who could be sued. So too in regard to personal actions, although the statute, in express terms, provides that the action shall be brought within four years from the accrual of the cause of action, and *not after*, the whole theory and design of the statute goes upon the assumption that the plaintiff has *neglected* to prosecute his action, which is not the fact where the debtor at the time the right accrues is out of the State, and therefore could not be sued. The authorities referred to below, would seem fully to sustain this construction of the statute of limitations, independently of the other question as to the virtual adoption into the act of 1712, of the nineteenth section of the statute 4 Anne. "A cause of action cannot be said to exist unless there be a person in existence capable of suing."—5 B. & A., 204. It would certainly seem equally essential to a *cause of action*, that there should be some one capable of being sued, as that there should be one capable of suing.—And so it has been held in the following case: "Where the testator resided abroad at the time the cause of action accrued, and *died abroad*, it was held that his executors, who resided in England, might be sued within *six years after taking out probate*." BEST. C. J., observed, "although the injury of which the plaintiffs complain, has existed more than six years, *they had no cause of action* until there was some person within the realm *against* whom the action could be brought. *Cause of action* is the right to prosecute an action with effect; no one has a *complete cause of action* until there is *somebody he can sue*, &c. 4 Bing. 686.

This last case would seem to have been decided independently altogether of the saving as to non resident defendants, in the statute of Anne. For that statute only provides, that persons entitled to the causes of action by the statute of James, "shall be at liberty, if the person *against whom* the cause of suit exists, were at the time of such cause of action accrued, &c., beyond the seas, to bring the said action against such person *after his return from beyond* the seas; *so as they take the same after his return from beyond* seas, within the time limited, &c." As the party in the last case cited never *did return*, this provision did not apply, and the case depended upon the true meaning and construction of words in the English statute of limitations precisely similar to ours. *Parties* are a necessary incident to a complete *cause of action*, in reference to our own laws and the jurisdiction of our own courts, and a party who, with reference to them, *may be sued*, is equally necessary

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as a party capable of suing. The result of this construction, applied to the particular case before the court, is that the plaintiff's cause of action, did not, in *fact*, *accrue* against Mitchell, the defendant, (who was out of the State at the time,) upon the payment of the money by the plaintiff on his account, but accrued upon his *return* to the State, or in other words at the *moment* of his amenability to the jurisdiction of our laws. This construction harmonizes entirely with the spirit and design of our own statute of limitations, and with the general principles applicable to all statutory limitations of the rights of action.—(See Chitty on Cont. 627, 631.) R.

JONATHAN JOHNSON v. LEONARD WIDEMAN.

Deceit committed by the vendor in the sale of property, like any other fraud, may have the effect to discharge the vendee entirely or partially, from the payment of the consideration money.—(S. P. Adams v. Wylie, 1 N. & M'Cord 78.)

But *damages* arising from a *deceit* in the sale of property (e. g. a negro,) cannot be set up by way of *discount*, in an action for the purchase money, so as to entitle the defendant to *recover damages* from the plaintiff.

It has been decided in this State, that torts and trespasses are not the subject matter of discount. Mitchell v. Gibbes, 2 Bay 120. In that case the judges said, "the discount law never meant that torts, trespasses, or *unascertained damages* should be set off; that it contemplated debts, dues and demands of a pecuniary nature, or something springing out of a contract, where there were mutual covenants which depended one upon the other." So in Lightner v. Martin, 2 M'Cord, 214, Judge Nott said "a set off means a *counter demand* which the defendant has against the plaintiff, and although our set off law is very comprehensive in its terms (embracing any cause, matter or thing,) yet it has always been restricted in its construction to demands arising on contract. Damages arising from slander, assault and battery, *deceit*, and other cases, sounding merely in *damages* have never been considered the subject of set off." A *deceit* is a tort arising, it is true, out of a contract; but the damages are unascertained, and are to be measured entirely by the discretion of a jury, and therefore can not be set up as a *discount*.

Johnson v. Wideman.

Before O'NEALL, J., at Abbeville, Fall Term, 1838.

The report of this case, by his honor the presiding judge, is as follows :

“ This was an action of assumpsit on a note of hand for \$100, a part of the price of a negro man named Charles, sold by the plaintiff to the defendant. The defence was, that the plaintiff in the sale, wilfully misrepresented the negro to be honest, sober, humble and not given to be a runaway. As the case is one of fact merely, and as the defendant's counsel seem to suppose that the verdict for the plaintiff was the result of my opinion, and not the judgment of the jury, I propose, however tedious and uninteresting it may be, to give from my notes the whole testimony, so that (if the Court of Appeals should so please) the defendant's counsel may at least have the benefit of a fair jury trial before them, who will *hardly be confounded* by the great complication of the case.

The note was admitted : so too it was admitted, that it was given as a part of the price of the negro Charles. The defendant then called his testimony as follows : Alex. Cummins, who said that he lives now in about two miles of the defendant ; in 1835, he lived with the defendant : he ploughed hard and worked generally for him. The cross roads called *Trick'em* is about two miles from the defendant's. He was at the defendant's when the plaintiff came with Charles, on Thursday, in January or February, 1835. Old Mr. Evans and Mrs. Lyon were also present. The plaintiff said to the defendant, he had come to sell him Charles ; the defendant asked if he was of good character ; the plaintiff said he was. The defendant said he wanted him for a blacksmith at *Trick'em* where there were spirits. The plaintiff said he thought Charles would suit him : he would drink a dram but would not get drunk. The defendant said he had one to kill himself by drinking ; another had been offered to him for \$600 ; but his owner told him his character was not good, and therefore he did not buy him. Two women were proposed to be given for Charles : no trade was made that night. The next day the parties went to *Trick'em* :

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Charles was put to work in the blacksmith's shop, and made a pair of horse shoes. The defendant then showed to the plaintiff one of the negro women he proposed to give for Charles: she had a sore leg, which he showed to the plaintiff. The plaintiff, on Friday night, went home with the defendant. On Saturday morning, the plaintiff, with Charles, went away; he went by another place belonging to the defendant, to look at the other woman offered for Charles. The defendant said, if it was a trade, he would come down (meaning to the plaintiff's) with the women. The plaintiff, in the course of the conversation about Charles said, any ten year old boy could manage him. The plaintiff said he knew the negro while Wiley Berry owned him. The defendant asked why Berry sold him? The plaintiff said it was on account of his wife. On Sunday the defendant left home with the women: on Monday he returned with Charles. Charles would get drunk; he would not work; he let his coal kiln burn up; was insolent; he was very often drunk; he saw him once lying behind the shop, and at another time in the woods. He (Charles) stayed with the defendant about two months and then ran away. The next time he saw him was about the middle of the week of October court, in jail at Abbeville: he was taken out in a few days afterwards and died in about two weeks. The defendant, in the conversation about the trade, at the defendant's house, said to the plaintiff, he knew nothing about the negro, and would rely on him, the plaintiff: he praised him for a good smith, of good character. The defendant asked if Charles would run away; the plaintiff said he never knew him to run away.

On his cross examination, this witness exhibited, with a good deal of ignorance, an unwillingness to testify to any thing for the plaintiff. He said he was thirty years old, he reckoned. A week before Charles ran away he saw him lying down in the woods; he ran away the last of April or the 1st of May. Some time before he ran away he lay down behind the shop. He heard Charles, on one occasion, curse the defendant and his overseer, Barker: for this offence, for not minding his work and for saucing other people, he was whipped. The defendant might have heard Charles

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when he cursed him. Barker was at a little distance from Charles, he might have heard it also. At the last court he said Barker was cursed to his face: the reason he then said so was, that he did not understand the question. Trick'em belonged to the defendant. He said, on Thursday night, the plaintiff and defendant, when talking about Charles, sat in the *hall room*, he, the witness, came in about dark; Charles was called in, so that the defendant might look at him; he does not remember the conversation between the defendant and Charles; he, however, remembered that Charles said he had belonged to Wiley Berry: he told the defendant if he would buy his wife, he would live with him. It was on Friday, when the parties were at the shop at Trick'em. He did not remember that the plaintiff told the defendant that he had once seen Charles drunk. In reply, he said that he heard both the defendant and Barker say that they heard Charles when he cursed them.

Wm. Evans was examined by commission, he said he was between eighty and ninety years of age. He was at the defendant's when the plaintiff brought Charles. The plaintiff said Charles was an honest negro: he would trust him with money. The defendant said he wished to buy a negro of an honest, sober character. The plaintiff said Charles would take a dram, but would not get drunk. He said, he was a very humble negro, a boy of ten years old could control him; he had known him a long time; he had belonged to Wiley Berry.

Mrs. Lyons said, she was the defendant's daughter. She remembers when the plaintiff brought Charles; he came in the evening before night; Mr. Evans, she thinks, was there; Mr. Cummins came in about dark. The defendant asked the plaintiff why he did not come sooner, he had almost got out of the notion of buying a smith; the plaintiff said he or the negro had been sick. The plaintiff said Charles was a negro of good character, he had known Charles to drink a dram, but never to get drunk; he was easy governed, a ten year old boy could govern him: nothing was said about the negro being saucy. She, the witness, was in and out of the room, as the parties talked about the trade. They (the plain-

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tiff and defendant) as they said, went the next day to Trick 'em. The plaintiff said he knew the negro when Berry owned him. The defendant said he would depend on the plaintiff, as he knew nothing about the negro. The defendant got Charles about the last of February or 1st of March. He ran away about the last of April. Charles was brought from jail in the fall, on Saturday; He died on the Tuesday following; he was a very impudent negro. On her cross examination, she said her father had been at the plaintiff's house before he came with Charles.

John Finley proved that he was at the blacksmith's shop on the day on which Charles was tried: the plaintiff asked the defendant how he liked the work: the defendant said he liked it very well. In the trade then spoken of the two negro women were rated at \$1,100, and the defendant was to give his note for \$100 to boot. The plaintiff said he could recommend the negro to any body, he was honest and sober; the defendant said if the negro would drink he would not suit him. The plaintiff said he would suit him; he would bring business to the shop; his work would average \$3 per day. When they started from the shop, the defendant said it would be a trade. The negro did not work much after the defendant bought him. When Russell, the keeper of the grog shop at Trick 'em, was gone to Augusta, he, the witness, saw Charles come out of it with a gallon of spirits; he said he would lend it to some one of them, though he would rather keep it. Charles was insolent and would not work only, as he pleased; he told people, when he did not do their work, they might go where they pleased. This he said to Mr. McBride and the witness. The plaintiff at this witness' house said, if the defendant had been cheated in the purchase of Charles, he (the plaintiff) had been also. "When he had property he traded it to the best advantage." The defendant, the plaintiff said, was a trading man, and he could have made his own out of the negro. On his cross examination he said, that notwithstanding he had been before examined in court in this case, he did not remember that he had before stated this conversation of the plaintiff. Since last court he and his wife, talking over the matter, brought this conversation to his recol-

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lection. When the plaintiff had this talk he was looking up testimony for this case. On the day when Charles was tried at the blacksmith shop, a man came in and offered liquor to the negro after he had shod his horse, the plaintiff objected to it, saying that Charles was as well off without it as with it. The conversation about the trade at the shop, at Trick'em, was on Friday.

Ivy Taylor said he was at the shop when Charles was at work on trial. The defendant said to him before he went into the shop, that he (Charles) was almost the finest negro he ever saw; he spoke of him in this way on account of his size. The plaintiff said he was as good as he looked. The defendant said he wanted a trusty, honest negro, one who would suit that place, (Trick'em:) one that he had, killed himself with drink, and he did not want one of that kind. The plaintiff said he would suit him, he thought.

John Barker, who was examined by commission, said he lived, in 1835, as an overseer for the defendant, at Pressly's place, one and a half miles from Trick'em. The plaintiff and defendant came to see one negro under him, last of January or 1st of February, 1835; they were speaking of an exchange of negroes: two women, Nelly and Amy, rated at \$1,100 were spoken of, to be given for Charles. The defendant said he wanted a smith at the cross roads (Trick'em) who could be depended on, as he would have no white man with him. The plaintiff said he would suit him. At one time Charles was drunk behind the shop: he once cursed him. His (Charles') character was not good.

John Russell said he kept the grog shop at Trick'em. The plaintiff, on the day on which Charles was tried at the shop, said he had better not let spirits go into it. While defendant owned Charles he gave notice that he should have no spirits: he (the witness) let him have none: but he was often drunk. He had no means of getting into his grog shop, with his knowledge or consent. He was saucy: he once saw him shove a white man, named Cramer, down. He did not bring much custom to the shop: he threatened to beat another white man named Wells. That occurred in this way: Charles went some distance from the shop, to shoe a wagoner's horse; Wells, who was a striker in the shop,

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went after Charles, to do some work in the shop, which had come in ; he said to Wells "no one man ever had or ever should master him."

Elias Walker said he lived with the defendant at Trick'em. Charles' conduct was very bad, idle, impudent, and drunken. He once saw him behind the shop asleep : he let a coal kiln burn up. He did not do a good day's work while he belonged to the defendant. Charles was whipped for impudence and laziness : but not severely. Charles once threatened Wells. Cramer was drunk, he went for fire, under a shelter where Charles was eating his breakfast, he pushed him and he fell down. He heard Charles say if ever the defendant struck him, it would be the last person he ever would strike.

Ed. Reagan said, he lived within two miles of Trick'em ; he is a wagon maker by trade. Charles' conduct was not good : he worked for people as he pleased ; he sometimes was away when people called to have work done. He was "tolerably saucy." He (Charles) said that "neither white nor black had whipped him by force." He saw him once drunk behind the shop. On the day of Charles' trial as a smith, at Trick'em, he was present in the shop, the plaintiff said the negro man was a good character and good smith. He (the witness) told the defendant that he thought the plaintiff was telling him a pack of lies : he (defendant) said "no the plaintiff was a preacher."

Jonathan Lasseter was examined by commission; and said, that the plaintiff in February or March, 1836, said the note now in suit was in payment for Charles ; that the two negroes he got sold for \$1,100. He, the plaintiff, said the defendant wished a rue, he told him to sell Charles and make his own. Charles' character was that of a rogue, a liar, and a runaway.

John Lewis said he went with the defendant to catch Charles. He caught him at Berry's, in the gin house, in the night ; he was crouched in a corner with a knife in one hand and a club in the other : when he found he was discovered he made a rush to escape, he was shot at, the witness seized him, he carried him out of the house, broke loose and ran off, was pursued and taken. The de-

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fendant applied to Dr. Gray to look at his wounds, which was done—they were dressed: he was brought to Abbeville and put in jail. He was wounded with squirrel shot above the collar bone. When he seized the negro, he cut his coat with his knife. When he was brought to jail, Posey was the jailor: The defendant employed Dr. Taggart to attend the negro, and told Posey he would pay him something extra to attend to the negro. He had, when taken out of jail, the typhus fever: Dr. Hibler attended to him after he was taken home.

Thos. McBride said he had work done at the defendant's shop. On one occasion he went to get his horse shod: Charles was drunk: he would not shoe the horse, and swore that he would not work for him or any other man that day. His conduct was such as to drive away customers.

L. Drake was examined by commission: he said that he overseed for the plaintiff in 1834, when the plaintiff owned Charles: his character was bad: he was a drunkard, not steady at his work, and not easy to be controlled. The plaintiff knew Charles' bad conduct. Charles was at one time complaining of being sick: he was about giving him medicine: he (Charles) went off into the woods. The plaintiff said, while Charles belonged to Berry, he jerked him down and hurt him badly. He (the witness) heard Charles tell the plaintiff he would not do a piece of work until it came to his turn. He was the worst disposed negro he ever knew.

Ed. C. Beasely proved that he knew Charles in the plaintiff's possession: he was a runaway: drunken and disobedient. This was the plaintiff's own account of him in the fall of 1835, when he said he would get rid of him.

Mr. Patterson was asked as to the character of Ed. C. Beasely: he said it was good.

John Wideman said his father lives near the plaintiff. His brother (who as well as he, was a boy) was once about whipping Charles' wife: she broke and run, crying and calling for her husband. Charles came to her and asked what was the matter: she said William, the witness' brother, was whipping her: he swore he would mash him to the earth. At another time he and his bro-

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ther chased Charles from the kitchen; he turned and offered to fight them. The plaintiff said he wanted to sell Charles, for he could not attend to him, as he was often from home. He saw Charles drunk on Sunday, when Henry Johnson owned him.

Charles Fooshe said that he lives in three miles of the plaintiff's: two and a half miles of Henry Johnson. Charles would drink and swear: he was insolent: he was a very bad character: he thought him very lazy, &c. When he belonged to the plaintiff, he went to have some work done; Charles had to be called, and at last came out of a willow thicket in the field. Charles once swore he would not live with the plaintiff. Drake's character, he said, was good. The bad character of Charles was that of drinking and being insolent.

John Fooshe said he lives near the plaintiff. Charles was a drunkard. When drinking, he was insolent: he had the character of being lazy. On his cross examination, he said he saw Charles drunk on Sunday, at Lodi.

Gen. James Gillam said he lives near the plaintiff: he has seen Charles: his character was not good: he was, by reputation, indolent, insolent, a runaway and a drunkard. He came once to his store: he asked him for a ticket: he said he had never been asked for such a thing before. Witness ordered him off.

Major Wm. Eddings said he knew Charles: he once belonged to his father: he bought him from Berry, kept him four or five years and sold him back. When he belonged to the plaintiff, it was said he drank too much, and that he was impudent. He was a pretty good blacksmith. When the plaintiff bought, taking him *as he was*, he was worth over \$1,000. In the fall of 1835, he was worth \$1,200.

Ransom Holloway said that he lives in four miles of Berry—he knew Charles: his character was not good—he was saucy—he would drink: he was not inclined to work. He does not know any negro who was as bad. Charles and Norris (a white man) were gambling—he struck Norris. At a race, Berry and another white man were quarrelling. Charles came up behind his master, shut up his fist and swore that he wished he was a white man.

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In the winter of 1835, the plaintiff came to his house seeking Charles, who was run away: he said, "he was about taking him to Newberry, and selling him: he did not suit him: he would drink: and as he was often from home, and found little done on his return, if he had not better management, he must shut up shop." While Charles belonged to the plaintiff, in going down to Berry's he often stopped at his house, with a jug slung around his neck and nearly drunk: on Monday morning he returned at a late hour. He was calculated to do injury to other negroes: he would not have bought him to keep. He offered to trade for Charles when he was run away, at the time of which he has spoken.

James Spikes said that he lives in five miles of witness, Berry: he knew Charles—his character was bad; he was drunken and insolent: he did not work well, and was not easily governed. The day Henry Johnson bought him, Charles quarrelled with Berry: charged him with keeping his wife, shut up his fist and was walking towards Berry, when Johnson prevented him. Charles had the character of being a rogue: he was worth nothing to keep. On his cross examination, he was asked if he knew or had heard of any instances of stealing by Charles? He said not, with the exception that Berry's store had once been broken open, and he intimated to the witness that he believed his own negroes, with Charles at their head, had done it. At Berry's there was a great deal of drinking, gaming, &c. Berry was himself a drinking, horse-racing man.

Mark Nobles said that he lived in about one and a half miles of Berry; he caught Charles when runaway, while the plaintiff owned him, in the latter part of January, 1835: and put him in Edgefield jail. He was a saucy, drinking, unmanageable negro. He once saw him catch hold of a white man, named Grice, (who he, witness, thought had been gaming with Charles) and jerk him down and kick him. On another occasion, he took up a block, and told a white man of the name of Taft, if he would come out of the house he would knock him down. He would swear to this witness he would not do his work until he thought proper.

Wm. Adams said he lived near Wiley Berry's, Charles was a

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drinking, saucy negro, not easily controlled. He and his brother once overtook Charles below Berry's, they had a little dog following: he had two big ones, they jumped on their little dog. He, the witness, told Charles to part them: he swore he would not: he and his brother got down to part them; Charles got a stick to prevent them from doing it; he swore they should not be parted: he resisted them, and at last drew his knife.

James Sheppard said he lives near to, (in one and three quarter miles of) Berry's. Charles was a drinking, insolent, ungovernable negro. He insulted him at his own house: he came there at the time of a race, against his orders: he saw him at night amongst the crowd in his store, and ordered him off: he went into the piazza, and was there cursing him: he, witness, went out, Charles got into the road, and swore he would stay as long as he pleased: he (the witness) beat him with a stick, and drove him off. He would not have liked to own him. On his cross examination he said at the camp muster at his house in August, 1835, the defendant offered to sell Charles to him.

John Anderson said he knew Charles' character: it was bad, uncommonly so: he was charged with committing a rape: he was tried and acquitted, though he was in fact guilty: he was subsequently tried for the assault, convicted and whipped. On his cross examination, he said the rape and assault of which he had spoken, was on the body of a negro girl, a slave.

John Kirksey said, he lives within six or seven miles of Berry. Charles' character was bad: he was a drunkard: probably he had heard that he was a rogue: he was an ungovernable, insolent negro. He forbade him his place; told his master if he did not keep away he would shoot him.

William Walker said, he knew Charles well: he was not easily managed: he would drink, and was insolent, and not easily controlled. He was the overseer for Berry at one place: the negro woman there had got breakfast for him, (witness,) he went to eat it: Charles turned into cursing: he ordered him out: he would not go: he struck him: Charles took his stick out off his hand: jerked him up close to him: set his nose to bleeding: he went to get a

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gun to shoot him ; Charles went off very leisurely : he neglected his work and did pretty much as he pleased.

Robert Walker said, he lives near Wiley Berry. Charles was a turbulent, unruly negro, given to drinking. He saw him strike Kemp, who was the overseer and son-in-law of Berry. Kemp told him to cut some wood and lightwood : he said he would not. Kemp said he would be damned if he should not : Charles said he would be damned if he would. Kemp followed him with a board :— Charles took it from him and struck him, and went on his way, whooping and hallooing. Charles' character was, that he was not honest. The instance within his knowledge and from which he formed his opinion of his character was, that his master whipped him for stealing Hez. Burnet's mare : that is, Charles took the mare without leave, and rode her some little distance, (an hour or two,) and was returning with her when he was met, and the mare took from him. Charles would not work well.

The defendant here closed, and the plaintiff replied in proof as follows: The defendant, on notice produced, and the plaintiff gave in evidence, his bill of sale for Charles ; the consideration was \$1150 : he was described in it as a good blacksmith. The title merely was warranted.

Nathan Calhoun said, he lives near the plaintiff. Charles had a wife at his house, (Polly,)—he bought her from Berry : he was present when the plaintiff, at his house, delivered Charles to the defendant. The plaintiff and defendant came together. Charles was delivered in his presence. The plaintiff told the defendant, that Charles was fond of spirits and would drink too much. The defendant did not seem to regard that, as he would have a white man at the shop. He (the witness) never saw Charles drunk : he never gave him any insolence. The plaintiff was often from home while he owned Charles. There was no drinking or disorderly company about the plaintiff's.

On his cross examination he said, that he sold Polly to the defendant, and he sued him for her price ; on account of her unsoundness, the defendant cast him. He once suspected Charles of breaking open his corn crib, but he afterwards became satisfied

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that there was no grounds for the suspicion. There were no bill of sale executed at his house ; he supposes that the trade was made before they came. The character which followed Charles from Berry's was, that he was drunken and insolent. There was, within his knowledge, no instance of his insolence after he came to the possession of the plaintiff or his brother. Mr. Wideman when told of Charles' drinking did not seem surprised.

Alexander Presley said, he lives in Edgefield : he knows the defendant : he lived in 1835 within one and a quarter miles of the defendant : he worked that year at Perrin's, between Trick'em and the defendant's house. Before the defendant bought Charles, he heard him say, that he "could get a blacksmith : he was under a bad character ; he had belonged to Wiley Berry : and as he could out-general old Wiley Berry, he must be bad : the defendant said he understood he could make a key which would unlock any door." This was about the first of January, 1835, or a little after. Since he came to court, the defendant asked him what he would prove : he told him : he (the defendant) said it would destroy his suit, (defence). The defendant said he thought he must have misunderstood him, as he alluded to another negro. He saw Charles passing from Trick'em to his master's : he never saw him drunk. He, the witness, sometimes drinks too much : but he was sober when the conversation took place between him and the defendant.

Henry Johnson said, he is the plaintiff's brother. He bought Charles in August, 1833, for \$1200, from Wiley Berry ; he sold him to his brother, the plaintiff, for the same sum, on 31st December, 1833. He lived near the plaintiff until November, when he moved to Laurens. The way he came to buy Charles was as follows : He was going by Berry's : he stopped to get water : Charles was shoeing a horse : Berry boasted of his qualifications as a smith, and proposed to sell him : the witness offered him \$1200, payable in January, which Berry took. He (witness) had no knowledge of Charles before. On the day he bought Charles, and after he had bought him, a fuss arose. Berry had a stick and was about striking the negro : he told him not to do it. After he owned Charles, he behaved himself well : he worked well, he was obedient : he would

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sometimes take a dram, and he once was drunk. He had heard rumors against Charles from below, but he knew nothing certain and said nothing to the plaintiff about them when he sold to him. On his cross examination he was asked if he did not sell Charles out of jail to his brother, the plaintiff? He said that he was about removing to Mississippi, and understood that Charles said if he did not get his wife he would not go with him: he went to the shop and tied him, and put him in jail for safe keeping. He agreed to live with his brother, and he bought him. This witness said that sometimes he himself drank too much. On the day he bought Charles, he (the witness) did not go in between Charles and Berry to keep Charles from striking Berry.

Mr. Brown said, he lives near Trick'em; he was present when Charles was working on trial in the blacksmith's shop. Young offered him a dram; the plaintiff said he might give him a dram, but not to give him too much, it might prevent him from doing his work well. The plaintiff and defendant were standing together when this conversation took place.

Oswald Neely was examined by commission, and stated that the defendant came to the plaintiff's to buy Charles. The plaintiff told the defendant that Charles was then from home, that he had been about taking him to Newberry for sale, and he had gone off to get his clothes, or somebody to buy him: the latter was the most probable, on account of his wife. He told the defendant then that he would drink: he was rather fond of a dram. The defendant said that he would not suit him, as spirits were sold where he wanted him to work. On his cross examination, he said Charles was hard to manage: he was a drunkard. The plaintiff he said did not state to the defendant fully Charles' character.

Lewis Busby said, he lives within three miles of the plaintiff: in 1834 he lived within three or four hundred yards. He saw nothing amiss in Charles' conduct. His work was done well in the beginning of the year: not so well in the latter part of it. He saw nothing of drunkenness, insolence or turbulence. He heard of his drinking. He had borne the character of an insolent negro: but not in the time he belonged to the Johnsons.

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Aaron Pinson said, that in 1834, he lived within one and a half miles of the plaintiff: he saw Charles while he owned him: his (witness') work was done there. He was not insolent, so far as he knew: he was as humble as is usual: he worked very well. He once thought Charles had been drinking: he accused him of it: he said, oh, massa Aaron, one must have a dram. While the plaintiff owned him, he heard nothing against the negro, except the affair with Wiseman's sons.

Downs Calhoun said, that in 1834 he lived within one and a half or two miles of the plaintiff: he knew Charles; he saw him frequently; he saw nothing amiss; he heard of nothing against him: he saw him when Henry Johnson owned him; no improper conduct came within his observation. He has heard it said he was fond of spirits; though he cannot say during the time the plaintiff owned him he heard any thing good or bad about him.

John N. Sample said, that he lives within a mile of the plaintiff: in 1834 his work was done at the shop: he saw Charles frequently. He was drunk once when Henry Johnson owned him, (the time of which he spoke on his examination); he heard or saw nothing of drinking or of insolence (except the affair with Wiseman's sons) while Charles belonged to the plaintiff. The work Charles did for him was pretty well; he saw a screw plate which Charles said he made: it was difficult to make.

Henry Johnson recalled, said Charles made the plate spoken of by Mr. Sample.

Willison B. Beasley said he lives in about two miles and a half of the plaintiff: he saw Charles frequently: he worked for him: did his work well: he never misbehaved in his presence, nor was drunk.

The Rev. Mr. Trapp said he lives in Edgefield, and lived near Mr. Berry when he owned Charles. For the first five or six years after he came into the neighborhood, Berry and his place were notorious for drinking and gaming. Charles was a drunkard. His master kept spirits: people would treat Charles when doing their work: his master would let him have spirits. When drunk he was very impudent: more so to some than to others. When drunk he

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was very ungovernable. He was a pretty good smith, but would slight his work. He knew Charles when both the plaintiff and his brother owned him: during the time they owned him, he saw nothing amiss. He saw him every month (nearly) as he rode right by his shop—he talked to him humbly and respectfully. He was not so indolent as when he belonged to Berry.

Maj. Eddins said that in 1835, Charles, as he was, would have sold readily for \$1200. He gave it as his opinion that he could easily have managed Charles and made him very valuable: he narrated a conversation between him and Charles on the subject of his buying him, in which Charles exhibited a great deal of humbleness.

Benj. L. Posey, Esq. said that he was the jailor in 1835: the defendant brought Charles to jail 2d Sept. 1835; he was taken out in a dying condition, 10th Oct. following. When committed to jail he had a gun shot wound, of which he got well. He was taken sick and was thought to be dangerous: he first wrote to the defendant informing him of the negro's condition: he afterwards went to his house, and he then sent for the negro. When the defendant put him in jail, he put him in for safe keeping, and said his price for him was \$1200.

By Temple Hargrove, the plaintiff made an unsuccessful attempt to assail the character of L. Drake.

The plaintiff here closed his proof and the defendant rejoined.

Gen. James Gillam was recalled, and said that Drake's early life was a wild and dissolute one; he afterwards reformed, and he would be bound to believe him. He was not an industrious man; he went off and left his debts unpaid.

Sherwood Corley said that Charles was flogged at Berry's; he had often helped to tie and whip him; it had no effect on him; he would curse his master as soon as taken down. Henry Johnson told this witness that on the day he bought Charles he abused Berry; told him he kept his wife, and that they had a fuss: Berry, this witness said, wanted Johnson to take back his note and he would kill Charles. Henry Johnson, he said, also told him, that he and Charles after he brought him home, went to Cambridge to buy

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blacksmith tools: they were drinking and Charles knocked him down. On one occasion, he and another man bought a bottle of whiskey at Berry's, sat it on a board or bench outside of the store; Charles was starting to see his wife and took the bottle; they followed him, took it from him and whipped him: he said he also had a bottle and took this to be his by mistake. On his cross examination, he said Wiley Berry, Johnson, and himself were all drinking. He said that he could not say certainly that Henry Johnson told him about the fight between him and Charles at Cambridge.

Simpson Matthews said he lives in four or five miles of Wiley Berry: he saw Charles and Henry Johnson on their way to Augusta, (after Johnson had bought Charles,) both had been drinking. Charles was cursing old Berry. On his cross examination, he said that Garland Goode wished to buy Charles, while the defendant owned him and when he was runaway, and told him he would give \$1200 for him. He told defendant that a man would buy him. The defendant then said he would not take less than \$1200 for him. He said he would return him to the plaintiff.

Maj. Adams said he saw the defendant in search of a blacksmith. Holt's smith was offered at \$600, as he understood from the defendant. He told him his character was not good, dishonest and impudent, he was a good plantation smith, 35 or 40 years old.

John Lewis said that the defendant put Charles in jail for safe keeping, until he got well, and then he intended to restore him to the plaintiff.

The defendant here closed his testimony—and the plaintiff replied generally, by calling Gen. James Gillam, who said that Henry Johnson's character was a good one and that he was entitled to credit. Maj. William Eddins said the same.

Here the proof of the case closed. It was fully argued by Messrs. Perrin and Wardlaw for the defendant, and by Mr. Burt for the plaintiff. I summed up and submitted the case to the jury, as fairly as I am able to do. I said to them in the commencement of my charge, that if they should in its progress, discover my opinion of the facts, that they would bear in mind, that it was not to govern them; their judgment, not mine, I told them, was to deter-

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mine in whose favor the case should be decided on the facts. I said to the jury in substance, that the defendant's contract, on which this action was brought, was to be enforced, unless the defendant's defence had been made out. If that had been done, I said to them, he could not recover damages on his discount from the plaintiff.—For this discount was for the deceit, which was a tort, and could not therefore be so set up. So that in this case their inquiry would be whether the defendant, in law, ought to pay the \$100 note sued on? To decide this, it would be necessary to inquire, first, what moral qualities would be so material, as that a misrepresentation of them would have the effect to rescind the contract? I said to them, that any quality represented to exist, which, if it did not, would have the effect of diminishing in a considerable degree, the usefulness and value of the slave, would have that effect.

Habitual drunkenness was I told them, such a vicious habit as would justify them in rescinding the contract, if they should believe that it existed, that the plaintiff knew it, and so knowing, deceived the defendant by informing him that the negro was sober. I told them that occasional intoxication, not amounting to a habit, would not justify them in rescinding a contract.

An habitual runaway was, I thought, a material defect, which might justify them in finding, for the defendant, if there was on the part of the plaintiff a wilful misrepresentation. Occasional flights of a slave from his master's service for special causes would not constitute any material moral defect.

Honesty, I said to them, was a material moral quality in a slave: but nothing short of general dishonesty would show a defect in this behalf. For occasional thefts among the tolerably good slaves may be expected: and I illustrated this notion by reference to John Randolph's opinion of the honesty of slaves in a letter written by him to a lady, published a few years since.

I said that it was possible that such disobedient, impudent, unsteady habits might exist in a slave, as would seriously affect his value and usefulness, and when that was the case it might be a good defence. But, generally, I said, the policy of allowing such a defence might be very well questioned. For, most commonly, such

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habits were easy of correction by prudent masters, and it was only with the imprudent that they were allowed to injure the slave. Like master like man was, I told them, too often the case, in drunkenness, impudence, and idleness.

In the second place, their next inquiry, I said to the jury, would be, was the defendant deceived in the purchase of Charles? This depended upon two other subsidiary inquiries. 1st. Did the defendant, before he bought, know the slave by character, or otherwise, independent of the information he got from the plaintiff? Upon this point of the case, I arranged and contrasted the testimony on both sides. If, after going over this part of the case, the jury should not be satisfied that the defendant knew the negro, then, I said to them, they must inquire what was the plaintiff's representations, and were they true or false? Here again I presented to the jury a summary of the evidence on both sides. If the jury should be satisfied that the plaintiff falsely represented the negro in any material moral quality, then they must make the third and last inquiry, did the plaintiff know such representations to be false? If he did, the defendant must have a verdict; otherwise the plaintiff would be entitled to recover. On this last point of the case, I presented most anxiously every part of the testimony, which operated for, or against the plaintiff.

The jury found for the plaintiff, and I think their verdict is right, and ought to end the litigation between these parties."

The defendant appealed, and now moved for a new trial, on the following grounds:

1. Because the jury were instructed that they could not find damages for the defendant on his discount.
2. Because the verdict is contrary to law and evidence:—the defendant's testimony by commission having been disparaged and disregarded: his witnesses, who proved the plaintiff's misrepresentations, having been discredited without cause: his plain proof of plaintiff's *scienter* having been overthrown by negative testimony, or the testimony of plaintiff's brother, who, in two particulars, was contradicted: the effect produced upon defendant, by the misrepresentations, established by his whole conduct and con-

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versations, having been controlled by very loose proof of some intimations given to him of one of the faults of the negro: and the evident unfitness of the negro for the service for which he was bought, and which he was represented to suit, and his utter worthlessness to any one who would keep him, having been met by evidence of opinion, that his value for sale was such as to make plaintiff's deceit no injury.

3. Because in such a tedious and complicated case, the decided and forcible expression of the presiding judge's opinion in favor of the plaintiff upon every point of law and fact must have confounded the jury, who could not distinguish between questions of law and questions of fact; and the verdict is thus, in effect, the opinion of the judge, and not the finding of the jury.

CURIA, per O'NEALL, J. The first ground makes the question, whether the damages arising from a deceit can be set off? This question it is not necessary to decide in this case: for the jury, in finding for the plaintiff, decided that the defendant's predicate of his discount, the deceit of the plaintiff was not established. But, I may be permitted, in vindication of my circuit decision, to say a few words which will, I think, establish its correctness. The words of our discount law are very broad, embracing any cause, matter or thing, and if this matter was now, for the first time, to be decided, might make a very plausible case for the defendant. But in *Mitchell v. Gibbes*, 2 Bay, 120, it was decided that torts and trespasses were not the subject matter of discount. In that case, the judges said—"The discount law never meant that torts, trespasses, or unascertained damages, should be set off. That it contemplated debts, dues and demands of a pecuniary nature, or something springing out of a contract, where there were mutual covenants, which depended one upon the other." So in *Lightner v. Martin*, 2 M'C., 214. Judge Nott said, "a set off means, a counter demand which the defendant has against the plaintiff; and although our set off law is very comprehensive in its terms, (embracing any cause, matter or thing,) yet it has always been restricted in its construction to demands arising on contract. Damages

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arising from slander, assault and battery, *deceit* and other cases, sounding merely in damages, have never been considered the subjects of set off." After these authorities, it would seem to be in vain to talk about the right of a defendant to recover damages against a plaintiff on account of a deceit in the sale of a negro. The case of *Adams v. Wylie*, 1 N. & M'C. 78, cited by the defendant's counsel, was not the case of a discount, properly so called. In it, it was held that a vendee, deceived in the purchase of land, may plead, or give it in discount against a bond for the purchase money. The meaning of the court, collected from the case, is, that a misrepresentation in the sale of land may either entitle the purchaser to be entirely relieved from the purchase money, or to have an abatement, according to the extent and effect of the misrepresentation. It never has been doubted—and the case before us is an illustration of the application of the principle—that deceit committed in the sale of property, would, like any other fraud, have the effect to discharge the vendee entirely, or partially, from the payment of the consideration money; but the case remains yet to be decided, that it should, by way of discount, entitle the defendant to recover damages against the plaintiff. What is a deceit? It is a tort, arising, it is true, out of a contract; but the damages are unascertained, and are entirely to be measured by the discretion of a jury. These reasons, with the authorities to which I have referred, are sufficient, it seems to me, to show that in ruling this point of law against the defendant, the circuit judge was neither hasty, nor in error. As to the objections to the verdict, for supposed errors in fact, they require no other explanation or answer than those given in the report.

The motion is dismissed.

EVANS, EARLE, and BUTLER, Justices, concurred.

Wardlaw & Perrin, for the motion.

Burt, contra.

NOTE.—The reader is referred to a *former trial and appeal* in this case,

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to be found in Dudley's Reports, p. 325. On the subject of *discount*, see the cases of Madison & Latimer ads. M'Cullough, ante. p. 38, and Ewarts v. Kerr, ante. p. 203, in this volume. R.

EASTERLING (Ordinary) v. NEILL THOMPSON.

THE SAME v. THE SAME.

The creditors of a deceased debtor, whether by judgment, bond, or simple contract, must, for the collection of their debts, proceed against the executor or administrator of their debtor. They have no right at law to claim payment from any one else, unless it may be that in the case of a bond-debt, a recovery might be had against the heirs, on account of real estate descended. In equity, the rule is also *uniform*, that the executor or administrator of the debtor, must be a party.

The ordinary, in making up the accounts of an administrator, at the instance of a creditor, cannot do so, unless he has the proper parties before him: upon the death of an administrator, his administrator is not accountable to the creditors of the first intestate; against him they have no right of action. Their remedy is against the *administrator de bonis non* of the first intestate, whose duty it is to have an account from the administrator of the administrator.

During the life time of the administrator of an intestate, the creditors of the intestate have a right to claim an account from him. On his death, their remedy directly against him is gone. It is only through an *administrator de bonis non* of the *first intestate* they can have an account; for at law, or before the ordinary, the *administrator de bonis non* of the *first intestate*, is the only party entitled to demand the account. In *equity*, the creditors of the first intestate, by making the *administrator de bonis non* of such intestate, and the administrator of the *first* administrator parties, might claim, and have, *it seems*, an account of both administrations.

Before BUTLER, J., at Marlborough, Fall Term, 1838.

THIS was an action of debt on an administration bond. The report of his honor, the presiding judge, is as follows;

“ This report may be regarded as applicable to both of the above

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cases. The real plaintiffs, John M'Lauren and Hugh M'Coll, bring this action on the administration bond of Colon M'Coll, against the defendant, as one of his securities, to make him liable for the default of Colon M'Coll, in the administration of Duncan M'Coll's estate. They are the oldest creditors by judgments which they recovered against Duncan M'Coll in his life time.

Duncan M'Coll died some time in 1828, and administration on his estate was granted to Colon M'Coll, who gave his bond to the ordinary, with John J. Stubbs and Neill Thompson as his securities. Some time before 1830, Colon died, and administration on his estate was granted to Malcolm M'Bryde, on the 4th of January, 1830—and John J. Stubbs was appointed administrator *de bonis non* of Duncan M'Coll's estate. M'Bryde and Stubbs have both moved out of the State, leaving the debts against Duncan M'Coll's estate unpaid.

At the instance of the plaintiff, the letters of administration granted to M'Bryde, were revoked; and on the 19th of November, 1834, Hugh L. M'Intyre was appointed administrator *de bonis non* of Colon M'Coll's estate.

On the 22d of the same month, M'Intyre and Neill Thompson were cited before the ordinary, to give an account of Colon M'Coll's actings and doings on the estate of Duncan M'Coll, and thereupon the ordinary made up his decree against both of them. The decree is in general terms, stating that Colon M'Coll had taken into his possession and had wasted of the estate of Duncan M'Coll \$380, and that the defendants were liable to pay that amount to the creditors of Duncan. Colon's estate is insolvent, and this action is brought against Neill Thompson to make him responsible for so much as will pay plaintiffs, whose debts amount to \$280. The objections taken on the trial are the same that are taken in the grounds of appeal. I overruled the objections to the recovery, holding that the creditors of Duncan have a right to hold Colon's security liable for any default of Colon, whilst he acted as administrator, without making another administrator *de bonis non* of Duncan's estate a party. The acts of different administrators, on the same estate, are but parts of one administration,

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and each should be held liable to the extent of assets that come in his hands. It should be here remarked, that it was shown that Stubbs, the administrator *de bonis non* of Duncan, had never taken any thing of much value into his possession. Nor had he ever called on the administrator of Colon to account to him for Colon's administration, which he might have done, and thus in some measure have simplified these proceedings. But not having done so, the plaintiffs were not compelled to recover against him before they could resort to the one actually in fault and actually liable. This action is brought by those who have a right to have their debts paid out of the assets of Duncan M'Coll's estate, and against one who is answerable for the person who wasted them. The decree of the ordinary is accompanied by a report, which it was said was made to be used in some other cases, but which was applicable to this. Objections were taken to the decree and report on the ground, that they included M'Intyre as well as the defendant, or rather that they included defendant as well as M'Intyre, I did not think there was any thing in the objection. An ordinary's decree is but a judicial statement of accounts, and does not have any of the attributes of an enforceable judgment at law. Its purpose is to inform this court of the true amount for which an administrator and his sureties should be held liable in an action on their bond, and for this purpose the report and decree of the ordinary may be referred to, as sufficient in this case, with the understanding that the security always has the liberty to take advantage of any error committed in making up the accounts against the principal. This liberty was allowed the defendant in this case, and he went to the jury on the testimony he adduced, the object of which was to show, that Colon M'Coll had accounted for all Duncan's estate, or that it was insolvent. The jury negatived this conclusion by finding for the plaintiff."

The defendant appealed, and now moved this court for a new trial, on the following grounds :

1. Because the decree of the ordinary against Hugh L. M'Intyre, the administrator *de bonis non* of Colon M'Coll, who was administrator of Duncan M'Coll, deceased, was not sufficient to

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charge the defendant, Neill Thompson, who was security of Colon M'Coll, administrator of Duncan M'Coll, when, at the time of making the decree, J. J. Stubbs was administrator *de bonis non* of the estate of Duncan M'Coll, and was no party to the decree, or the proceedings before the ordinary on which the decree was founded.

2. Because the decree was void, it being rendered against two persons, to wit : H. L. M'Intyre, administrator *de bonis non* of Colon M'Coll, and Neill Thompson, security of Colon as administrator of Duncan, neither of whom represented or could represent the estate of Duncan M'Coll.

3. Because it did not appear that Duncan M'Coll, the intestate, had any property that came into the hands of Colon that was not accounted for, and properly and legally disposed of.

4. Because his honor instructed the jury that they must find against the defendant if any property went into the hands of Colon as administrator of Duncan, which he had not accounted for, without stating at the same time, that the proper person to account must be first cited to appear before the ordinary, and that this had not been done.

5. Because his honor charged the jury that the creditors had a right to go against any one, who, at any time had the estate of Duncan in his hands, unless he can show that he has paid away what he had received, whereas in this case the creditors could proceed in a court of law, against the administrator *de bonis non* of Duncan M'Coll only.

6. Because the defendant was not answerable in these cases in a court of law, and can be charged in equity only.

7. Because the decree of the ordinary is absolutely void as far as regards the defendant, Neill Thompson, and could not be given in evidence against him.

8. Because the decree of the ordinary was void, inasmuch as it did not state any account or any thing else, on which it was founded.

9. Because the finding of the jury was contrary to law, inasmuch as there was no evidence to support it.

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CURIA, per O'NEALL, J. The creditors of a deceased debtor, whether by judgment bond or simple contract, must, for the collection of their debts, proceed against the executor or administrator of their debtor. They have no right, at law, to claim payment from any one else; unless it may be that, in the case of a bond debt, a recovery might be had against the heirs on account of real estate descended. In equity, the rule is also uniform, that the executor or administrator of the debtor must be a party. The ordinary, in making up the accounts of an administrator at the instance of a creditor, cannot do so, unless he has the proper parties before him. Upon the death of an administrator, his administrator, is not accountable to the creditors of the first intestate. Against him they have no right of action. Their remedy is against the administrator de bonis non of the first intestate, whose duty it is to have an account from the administrator of the first administrator. These rules are so plain and obvious, that I have not thought it worth while to look for authorities for their support. It will not do to say that creditors have the right to follow the funds of their debtor into the hands of any one who has them. They have no right to require them to be paid to their debts by any one except his administrator. During the life time of Colon M'Coll, the creditors of Duncan M'Coll, deceased, had the right to claim an account from him. On his death, their remedy, directly against him, was gone: through an administrator de bonis non of Duncan M'Coll, they might have the account. For at law, or before the ordinary, the administrator de bonis non was the only party entitled to demand the account. In equity, the creditors, by making him and the administrator of Colon M'Coll parties, might claim and have an account of both administrations.

The security of Colin M'Coll has the right to insist that his principal is only accountable to the administrator de bonis non of Duncan M'Coll, or in a case where he is a party. For it may be, as between them, there is a defence to the account which could not now be set up against the creditors. I do not know the relationship between Colin M'Coll and Duncan M'Coll: if it is so, that the former was the son of the latter, and in an account claim-

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ed by the administrator de bonis non of Duncan, Colin's administrator could show that the administrator de bonis non, had assets sufficient to pay the debts, and that the fund in his intestate's hands was not more than his share, then the court would not compel him to pay it over. But if the creditors have a right to proceed against him directly, then this defence could not avail him, he would be liable to the account on account of the assets in his hands. It is possible that in this case, that there are no grounds for the case supposed; but the rule of this case must reach others, and the supposition here, may be reality there; and hence it is fair thus to test it.

The motion is granted.

EARLE and RICHARDSON, Justices, concurred.

BUTLER, J. I do not like to see the substance of justice sacrificed to mere form, where form is not imperatively obligatory. The plaintiff's demand is unquestionable. It consists of judgments recovered against Duncan M'Coll in his life time. As far as a court could establish such a demand by judgment, it has been done. Colin M'Coll, administrator of Duncan M'Coll, was liable to pay it in his life time; and no one doubts but that the defendant's securities will be held ultimately liable; for this obvious reason, that their intestate was the only person that ever had in his hands the assets of Duncan's estate; and that he wasted them instead of applying them to the payment of plaintiff's judgments, which were the oldest and first to be paid, according to law. The plaintiffs have shown that they have been injured by the conduct of Colin M'Coll, and that defendants, by signing the bond, bound themselves to be answerable for all his defaults as administrator. They took upon themselves the burthen of showing that no one else could have been held liable but Colin. After showing all this, they are to be turned out of court, that they may go through the idle form of suing one who has nothing to pay with, and has committed no default. If the plaintiffs had only shown that they had a demand by judgment against Duncan's estate, it would not have

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been sufficient to make Colin, or his securities liable. But when they showed that no other administrator de bonis non could be liable, it seems to me, they were fully entitled to have their judgment. The executor's law gives any one who has been injured by an administrator the right to sue on the bond. It is broad in its provisions, and should not be frittered away by judicial decisions. For these reasons I dissent from the judgment of a majority of my brethren.

EVANS, Justice, concurred.

Graham, for the motion.

Dudley & Dargan, contra.

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N. HAYDEN v. THE SAME.

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COLLINS, KEESE & Co. v. THE SAME.

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MILLER, RIPLEY & Co. v. THE SAME.

An assignment of the whole estate and effects of a debtor for the benefit of his creditors generally, though upon trusts, *preferring in the order of payment* one creditor to another, has been recognized in this State as valid and binding.—(See *Niolon v. Douglass et al.*, 2 Hill. Ch. R., 443, 446.

Such a preference is not “the *undue preference* of one creditor to another,” contemplated by the 7th section of the prison bounds acts, (P. L. 456,) and in itself constitutes no sufficient ground of opposition to the discharge of a debtor under the provisions of that act.

By the *undue preference* spoken of in the prison bounds act, is meant such an *intentional* preferring of *one creditor*, as may enable him to receive payment and *altogether defeat, delay, or hinder*, another creditor from being paid: a preference to come within the inhibition of this act, must be *fraudulent*.

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Where a deed of assignment for the benefit of creditors *generally*, though upon trusts, preferring in the order of payment some creditors to others, conveyed to the assignees all the effects of the assignor, and among other things choses in action to a considerable amount: HELD, that such assignment could not, on the face of the deed, be considered as made to *defeat, delay, or hinder*, the plaintiffs, creditors of the assignor, though not among the preferred creditors.

Where upon the trial of an issue upon a suggestion of fraud, before a commissioner of special bail, a question is put to a witness touching his opinion of the value of certain property assigned, which question is objected to and overruled by the commissioner: This court will not grant a new trial on that ground, if it perceives the point has been answered to by the witness in other parts of his testimony, as far as the nature of the inquiry would allow.

THIS case came up on an appeal and motion for a new trial, upon the finding of the jury in a question of fraud, tried before John Hanks, Esq., a commissioner of special bail for Sumter District. The report of the commissioner, which presents all the facts of the case, is as follows:

“Wm. H. Bowen, one of the parties of the firm of C. C. Campbell & Co., who was in arrest under the executions of the above stated plaintiffs, (together with three other executions, on which C. C. Campbell & Co. had been security for one A. China, which, since the appeal taken, have been partially arranged by said A. China, and the appeal as to them discontinued, as I am instructed by the plaintiffs attorney,) after the usual notice given and schedule filed, applied to be discharged under the prison bounds act. His application was resisted on behalf of above stated plaintiffs, on the ground of fraud and an undue preference given to some of his creditors within three months previous to the time of his arrest. A suggestion was filed, containing various grounds, which is herewith submitted. A jury was summoned and a court was organized conformably to the act of 1833, to try the facts contained in the suggestion. The cases being the same, were, by the arrangement of the parties, tried under the same suggestions. The schedule of Bowen contained nothing but his wearing apparel, and a small quantity of house and kitchen furniture, which was then under levy by the sheriff of the district, under senior executions.—

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The plaintiffs introduced in evidence, a deed of assignment executed by W. H. Bowen and Jacques Bishop, (two of the parties of the firm of C. C. Campbell & Co.,) on the 19th day of February, 1838, being within three months previous to the time of his arrest under these executions and present application to be discharged. The assignment was made to T. J. Withers, John M. Desaussure and John M. Gilchrist. The two former declined, the latter accepted the trust. The plaintiffs then introduced their judgments and showed that their debts ranked in the fifth and last class, according to the order specified in the assignment, a certified copy of which, together with the schedule of debts, accompanies this report. The sheriff of the district, (a witness of plaintiffs,) testified that he understood from Mr. Bowen, that he had included all his property in his assignment—that he had examined the schedule accompanying the assignment—that he considers the notes and accounts, specified in the first and second divisions, worth about \$22,000—that he had not seen the notes or accounts, but only spoke of that amount being put down against persons whom he regarded solvent, and the judgments enumerated, together with the executions, worth \$2000. That he had sold under executions against Bishop, Bowen and Campbell, which are older than the assignment, but which are provided for in it, property almost entirely of Dr. Bishop, to the amount of \$80,000, most of which was not embraced in the assignment, and that there still remained in Sumter district, liable to those judgments, about \$10,000 worth of property, exclusive of the Bishopville houses and lands, which were under mortgages to the Messrs. Du Boses, of Darlington, to secure them as securities upon the bond held by John Robinson, John Robinson & Son, and Robinsons and Caldwell, of Charleston—that he should be obliged to return the executions of *fi. fa.* in these cases, under which the defendant was arrested, *nulla bona*.—That the amount of judgments in his office against these defendants, is about 170,000 or 180,000 dollars, of which about \$40,000 is against Jacques Bishop alone, in favor of John M. Gilchrist, (preferred under the fourth class in the assignment)—110,000 due the banks, (preferred under the second class in the assignment,) one of

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which judgments was confessed some time before the assignment, and the others a few days before—the balance coming in under the different classes of the assignment; the plaintiffs under the fifth class which is the last. The sheriff also testified that of the debts due by persons in Darlington, stated in the schedules, he had no knowledge and could not speak as to them. That the schedule comprised all the debts, good and bad, that appeared upon the books for the last twelve or fifteen years—a great number of writs lodged to the last court. John M. Niolon, plaintiffs witness, testified that in Feb. 1836, he ceased to be a partner with Dr. Bishop, in the firm of J. M. Niolon & Co. The store at Bishopville was then worth eight or ten thousand dollars. He took the Camden store at \$14,000. The firm of C. C. Campbell & Co., went into operation when that of J. M. Niolon & Co. ceased. Dr. Bishop then owned at Bishopville, all the property which he lately owned; the lands at Bishopville and one hundred and sixty negroes. He transferred all the J. M. Niolon & Co. debts, to Dr. Bishop, about 50 or 60,000 dollars. Dr. Bishop then owed John Robinson about \$35,000—knows of no losses—regarded Dr. Bishop perfectly solvent at the time of the dissolution and apprehended no disaster.—On his cross examination, the witness stated that Dr. Bishop paid John Robinson \$90,000, by a plantation in the west, by which operation he made a considerable amount. W. H. Bowen was worth nothing when Niolon & Co. ceased. C. C. Campbell & Co. sustained losses in cotton in 1836 and 1837—they dealt very largely in cotton—owed some debts besides that to Robinson. Bowen was liberal in his dealings—does not know of a dollar that he has not assigned.

John M. Gilchrist, the plaintiffs witness, testified that the bonds due John Robinson, Robinson & Son, and Robinsons & Caldwell, mentioned in the first part of the assignment, amount to \$60,000, payable in one, two, and three years. That the amounts due the banks, preferred in the second class, was \$110,000, \$90,000 of which would be paid out of the sales of the property in Sumter district, under the bank executions, which were the oldest. He was unable to testify what was the amount of the debts due by the

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firm of C. C. Campbell & Co., but that he supposed they amounted to \$200,000. That few persons had taken the trouble to send in statements of their debts to him, as they thought it useless.— That it will take him five years to wind up the affairs of the concern. The confessions of judgment which he had against Dr. Bishop, amounted to \$40,000, and are preferred in the fourth class of the assignment. On his cross examination, he stated that the amount of western paper, all of which could be collected in two years, is \$42,000, in the hands of Robinson & Caldwell—16,000 had been withdrawn by himself before that, leaving the \$42,000. There was due from Christopher H. Taylor, of Alabama, \$10,000. The shoe store in Camden had been sold for \$6,250. The Bishopville houses and lands, which were mortgaged to secure the securities of the bonds to Robinson, were worth 30 or \$40,000—that Bowen had placed in one of the banks in Camden, and in the hands of Charles J. Shannon, (a judgment creditor to the amount of \$9,000,) \$14,000 in notes as collateral security. There was also some bank, rail road and hotel stock, mentioned in the assignment; also some Alabama lands, worth \$10,000—also a lot, or lots, in Camden, mentioned in the assignment. George Q. M'Intosh, plaintiffs witness, testified that he had the notes and accounts specified in the third and fourth division for collection, and not more than \$4,000 would be collected from them. The question was asked of witness, John M. Gilchrist, the assignee, if from his acquaintance with the amount due and the value of the assigned property, the debts specified in the fifth class would ever receive anything? It being objected to and overruled as incompetent, I also excluded his opinion and estimate as to the value of the assigned property. The witness, on cross examination, afterwards testified that as to the debts mentioned in the schedule, he had no knowledge of the solvency of many of the persons who were put down as debtors. That he had not examined the papers that had been turned over to him. The plaintiffs also offered in evidence, a paper signed by W. H. Bowen, the defendant, in April, 1838, certifying to a large amount of money delivered over and paid to J. M. Gilchrist. This paper is in possession of plaintiffs attorney, and is to

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be submitted with this report. All the witnesses concurred in stating that Bowen was very liberal and careless in his dealings, and had lost by going security and loaning money. The defendant called no witnesses. The jury found for the defendant on all the grounds contained in the suggestion, and the plaintiffs appealed on the accompanying grounds. At the suggestion of both party's attornies, for the plaintiffs and defendants, I herewith submit this amended report."

COPY DEED OF ASSIGNMENT.

J. Bishop and Wm. H. Bowen, to John M. Gilchrist.

STATE OF SOUTH-CAROLINA, }
Sumter District. }

Whereas, John M. Niolin and Jacques Bishop, late merchants and partners in trade, trading at Camden, under the name and style of John M. Niolin & Co., having dissolved their connection in business, and the books, accounts, notes, bills, bonds, judgments and choses in action and possession, of every description whatever, transferred, assigned, and set over to Jacques Bishop, and he is now the owner of what remains. And whereas, Lewis Johnston and Jacques Bishop, late merchants and partners in trade, trading under the firm of Lewis Johnston & Co., at Camden, have dissolved, and the books, accounts, notes, bills, bonds, judgments and choses in possession and action, have been assigned and set over to Jacques Bishop. And, whereas, also, the establishment at Camden, called the Millinery Store, was transferred to Jacques Bishop; and the whole, including all the debts and choses in action and possession, accounts, notes, bills, bonds and judgments, were assigned, transferred and set over to C. C. Campbell, Jacques Bishop, and William H. Bowen, late merchants and partners, at Bishopville, trading under the name and style of C. C. Campbell & Co., and the whole have become somewhat embarrassed, and desire to assign property in trust for the payment of their debts. Therefore, know all men by these presents, that we, William H. Bowen and Jacques Bishop, members of the firm of C. C. Campbell & Co., do, each for himself, and not one for the other, for and in consideration of \$10 to each of us, paid by Thomas J. Withers

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and John M. Desaussure, of the town of Camden, and John M. Gilchrist, of Bishopville, the receipt of which we do hereby acknowledge—and for and in consideration of the premises, have bargained, sold, released and assigned, transferred, conveyed and set over, and by these presents do bargain, sell, release, assign, transfer, convey and set over to Thomas J. Withers and John M. Desaussure, of Camden, and John M. Gilchrist, of Bishopville, their heirs and assigns forever, the following property: that is to say, the said Jacques Bishop does hereby bargain, sell, release and convey to the said Withers, Desaussure and Gilchrist, their heirs and assigns, the lots and tracts of land described as follows, to wit: one house and lot in the town of Camden, on Littleton-street, being the former dwelling of William H. Bowen; also, one house and lot in the town of Camden, on State-street, opposite De Kalb monument, both lots being purchased of William B. Parker; one lot of land in Sumterville, with store house and stables, being the lot purchased of H. Holleyman; one-third part of a house and lot in Sumterville, purchased at sheriff's sale, of Thos. Cogland; one tract of land containing one hundred and fifty acres, more or less, called Daniel's Tract of Land, situate in Salem, in the district of Sumter; one other tract of land in Salem, containing one hundred and fifty acres, more or less, being the tract of land now occupied by Samuel M'Kay; one other tract of land lying near Bradford Springs, containing one hundred and seventy-five acres, more or less, purchased at sheriff's sale as the property of Stephen Burkett; one house and lot in Sumterville, occupied by John D. Bowen, purchased at sheriff's sale as the property of John D. Bowen: one house and lot at Bishopville, on Camden-street, occupied by Wm. H. Bowen; one store house and lot at Bishopville, on Broad-street, having a front of seventy feet, and one hundred and ten feet back, now rented to P. L. M'Intyre; one house and lot at Bishopville, on Broad-street, containing half an acre, now rented to Henry Holleyman; ten vacant lots at Bishopville, containing one hundred and ten feet front, and two hundred and twenty feet back, on Camden-street, to be designated and laid out by Jacques Bishop; three vacant lots at Bishopville, sit-

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uate on Broad-street, containing ninety feet front, and running back one hundred and ten feet, to be designated by Dr. Bishop, Isaiah Dubose, and K. C. Dubose, to release the lots sold at Bishopville, from the mortgage thereon ; also, seven hundred and twenty acres of land in the county of Marengo, in the State of Alabama, being the land for which Gaines Whitfield gave bonds for titles, to be sold on a credit of one and two years, if demandable ; one half of about twenty-two hundred and fifty acres of land, say his interest in about twenty-two hundred and fifty acres of land in the county of Marengo and State of Alabama, being the entries of land purchased of the concern of John M. Niolin & Co., Wm. E. Johnston and John J. Blair, subject to one-fifth of the profits over costs, to be paid to James H. Bradfoot for entering it, to be sold on a credit of one and two years, with interest if practicable and advisable. Also, the following personal property, to wit : all the leather and hides at the tan yard, to be sold by the assignees so soon as it can be got up and prepared for market ; also, all the household and kitchen furniture, now in the hands of John D. Bowen ; also, one chestnut sorrel horse in the possession of John D. Bowen, the last two, to wit ; the furniture and the horse, to be sold on the first day of January next, or so soon thereafter as the assignees can make sale thereof, as they are not to be delivered up before that time ; also, three mules ; one sorrel horse ; one wagon, now in the possession of John D. Bowen ; also, all the debts due the said Jacques Bishop, individually, consisting of judgments, notes, accounts, bonds and choses in action of any and every description, a schedule of which the assignees agree to make out and furnish in fifteen days from the date hereof, which, when signed, shall be attached hereto and made part of this assignment ; also, all the accounts, notes, bonds, judgments and demands of what sort soever, which belonged to the late firm of John. M. Niolin & Co., Lewis Johnston & Co. and the Millinery store, a schedule of which shall be made out and signed within fifteen days from the date of these presents, or as soon after as practicable, attached hereto and become part of this assignment ; also, all the notes, bonds, bills, judgments, and other debts whatsoever, which belong-

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ed to Bishop & Gilchrist, in the hands of John Robinson & Son, or Robinson & Caldwell, of Charleston, or in the hands or possession or control of William Robinson, of Linden, in the county of Marengo and State of Alabama, to be collected by the said Robinson & Caldwell, and applied as hereinafter set forth and declared ; and the said Wm. H. Bowen does hereby assign and set over to the said Thomas J. Withers, John M. Desaussure, and John M. Gilchrist, their heirs and assigns, all the dues, demands, and sums of money due him from the firm of Christopher H. Taylor, William H. Bowen, and John M. Gilchrist, to speculate on negroes, as per written agreement ; also, all his interest in nine negroes, now in the possession of Isaiah Dubose, in the county of Marengo and State of Alabama ; also, all the demands he has on Christopher H. Taylor, of Marengo county, Alabama, consisting of notes, and one negro slave, named David, and one grey stud horse, the two last now in possession of said Taylor ; also, one house and lot in the town of Kirkwood, near Camden : also, one vacant lot in Camden, on Broad-st. and the said Jacques Bishop and William H. Bowen, two of the late firm of C. C. Campbell & Co., the said C. C. Campbell having retired from the concern, and being now out of the district, and the said Jacques Bishop and William H. Bowen, being now the owners and proprietors of the whole assets of the late firm of C. C. Campbell & Co., late merchants at Bishopville, do hereby assign, transfer and set over to the said Thomas J. Withers, John M. Desaussure, and John M. Gilchrist, all the notes, bonds, judgments, accounts, books and demands of any and every description whatsoever, a complete schedule of which shall be made out within fifteen days from this date, or so soon thereafter as it can be done, signed and attached hereto as a part of this assignment, in trust, nevertheless and to and for the uses and purposes hereinafter specified, set forth and declared ; that is to say, to sell all the property, collect all the debts and sum or sums of money, and pay and appropriate the same as follows, to wit: that the proceeds of all the lots of land at Bishopville, directed to be sold by the assignees, be applied to the payment of the bonds now held and owned by John Robinson & Son,

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John Robinson, and Robinson & Caldwell, to which Isaiah Dubose, K. C. Dubose and A. G. Crosswell, or either of them, is security ; also, that the proceeds of all the lands directed to be sold, situate in Alabama, the interest of the negroes in Alabama above assigned, and all the drafts and bills of exchange, and other papers, notes, &c., now in the possession and power of John Robinson, John Robinson & Son, and Robinson & Caldwell, of Charleston, and William Robinson, of Linden, in the county of Marengo, in the State of Alabama, be applied to the payment of the said bonds to Robinson, Robinson & Son, and Robinson & Caldwell, or either or any of them, secured by the persons above stated, and that the said drafts and bills which formerly belonged to Bishop & Gilchrist, C. C. Campbell & Co. or William H. Bowen, be collected by the said Robinson & Caldwell, and appropriated by them, and if a sufficient amount to pay the first instalment of said bonds be not collected, then the assignees are required to pay said first instalment out of any money arising from any of the property assigned, and the said debts in the hands of the Robinsons and Caldwell shall stand for the balance of said bonds, each to be paid equally, that is, the same per centum : Secondly, that the assignees shall sell and convey all the lots and tracts of land above assigned, (except the lots of land at Bishopville and the lands in the State of Alabama, which are already disposed of,) on such terms as they think most for the benefit of the assignors, and that the proceeds be applied to the payment of the Bank of the State of South-Carolina, at Charleston, against C. C. Campbell & Co., Jacques Bishop and William H. Bowen, or any or all of them. Thirdly : that the said assignees collect all the accounts, notes, bonds, judgments and debts of every description, so soon as it can conveniently be done, and with the monies collected pay first the first instalment of the bond due Robinson & Caldwell, John Robinson & Son, and John Robinson, if it be not paid by collections out of debts and from the sales of property above designated for that purpose, the costs and charges of this assignment, and the principal and interest due on a bond given in eighteen hundred and eighteen, or nineteen, to Moses Sanders, at Dar-

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lington Court House, which was drawn, or directed to be drawn, by the Hon. Josiah J. Evans, to secure Mrs. Penelope Bishop the sum of about five thousand dollars, being the amount of her share of the real estate of Col. Benton, purchased by William Thomas. Fourthly : after the payments above designated be made, all other funds arising from this assignment, unless herein otherwise disposed of, shall be appropriated from time to time, of which one month's notice shall be given, to all the judgments against Jacques Bishop, C. C. Campbell & Co. John M. Niolin & Co. Bishop & Gilchrist, or either or any of them, and to all notes, bonds, bills of exchange, or other evidences of debt, or any, either, or all of them on which there is an indorsement or security, (including those bonds above partly specifically provided for to Robinson & Caldwell,) and any sum of money that may appear upon settlement, if any such will appear to be due to John M. Gilchrist by Jacques Bishop, pro rata, provided the debts of the grades above specified be presented ; but if, after notice of one month given, they are not presented for payment, those not presented need not be regarded in the payment directed to be made. Fifthly : after the payments above designated to be paid, be made, the balance of the funds shall be applied to the payment of all debts owed by Jacques Bishop, C. C. Campbell & Co. William H. Bowen, Bishop & Gilchrist, or either of them, and all debts for which all or either of them are, or is liable, pro rata. In every instance where payments are directed to be made pro rata, notice of an intention to pay shall be given for one month, designating the time and place of such payment ; and any one not presenting his debts shall receive nothing at that time, nor can he render the assignees liable for paying away the funds to other debts and omitting to pay his. His debt may be presented at any other payment. Any one or more of the assignees who will accept has full power and authority to carry out the purposes of the trust herein stated, and for that purpose to employ an attorney or attorneys under him or them to dismiss them or any of them at pleasure, to pay said attorney or attorneys, agent or agents so employed, what they may judge reasonable and proper for their services, out of the trust fund. They

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shall also have full power and authority to settle, arrange and compromise debts, supposed to be bad or doubtful, as they may judge most conducive to the interest of the assignors, and all interested in the property and debts assigned, and the payments made to agents and attorneys for their services, shall not interfere in any way with the compensation to be received by the assignees, or be considered part of their compensation. The acting assignees shall receive 5 per centum commission for their trouble over and above all costs, charges and expenses of collecting and paying away, and each shall be responsible for his own acts only, and if the property and debts above assigned, be insufficient to pay the debts due and directed to be paid, then, and in that case, J. Bishop agrees, and hereby binds himself to deliver over to the assignees, and the right of property is hereby changed, fifty negroes, to be designated in families by J. Bishop, and any other surplus property he may think proper to be disposed of; and if after payment of all debts directed to be paid, there shall still remain in the hands of the assignees any property or funds, then, and in that case, the assignees will return the surplus to J. Bishop or his assigns. In witness whereof we have hereunto set our hands and seals, at Bishopville, this nineteenth day of February, in the year of our Lord one thousand eight hundred and thirty-eight, and in the sixty-second year of American Independence.

JACQUES BISHOP, (L. s.)

WILLIAM H. BOWEN. (L. s.)

Signed, sealed and delivered, }
in presence of

ALEX. GRAHAM,
T. D. BISHOP.

The plaintiffs appealed, and now moved for a new trial upon the following grounds:

1. That the assignment executed by Jacques Bishop and William H. Bowen, on the 19th of February, 1838, did by its very terms, give an undue preference, within three months previous to his arrest, to some of the creditors of the defendant, to the prejudice of the plaintiffs.

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2. That the facts in evidence before the jury, made out a case of undue preference of some of his creditors by the defendant, to the prejudice of the plaintiffs, within three months before his arrest.

3. That the assignment by Wm. H. Bowen of his property, to pay the bond given in 1818 or '19, to Moses Sanders, at Darlington Court-house, which was drawn, or directed to be drawn, by the Hon. Josiah J. Evans, to secure to Mrs. Penelope Bishop, the sum of about five thousand dollars, being the amount of the share of the real estate of Col. Benton, purchased by Wm. Thomas, was a voluntary gift for the benefit of Mrs. Bishop, and such a fraud on the creditors of the defendant, within three months before his arrest, as to deprive him of the benefit of the prison bounds act.

4. That the said assignment by the defendant, on the 19th February, 1838, to pay the debts of Jacques Bishop, and particularly of such balance as might be due to John M. Gilchrist by Jacques Bishop on settlement, is a fraudulent conveyance of the defendant's property to defraud his creditors, within three months before his arrest.

5. That the commissioner of special bail excluded the testimony of John M. Gilchrist, the assignee, as to the value of the property set forth in the assignment and schedule of the 19th Feb., 1838.

6. That the commissioner of special bail refused to suffer the said John M. Gilchrist, the assignee, to state whether A. R. Ruffin and others, named as debtors in the said schedule, did not inform him that they had claims against the assignors in the said assignment.

CURIA, per O'NEALL, J. The first and fifth grounds of the plaintiffs motion will alone be considered: the others were either abandoned, or are involved in the first ground, or present naked questions of fact, which the court regard as resolved by the verdict of the jury. I will consider the fifth ground first. Looking to the general terms in which it is set down, and to the manner in which the commissioner of special bail reports his decision, I should be inclined to think the question overruled was competent, and ought to have been answered: for the valuation of property is always

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matter of opinion. But in passing upon the report made by a commissioner of special bail, it is not right that we should decide any point upon a rigid construction. If it be possible, the precise point decided, with its attendant circumstances, ought to be ascertained from the entire statement. On looking through the report, it is plain that Gilchrist was examined as to the value of parts of the assigned estate. He stated the amount of the debts due to the assignors in Mississippi and Alabama: the amount at which the shoe store in Camden was sold: the value of the Bishopville lands: the amount of notes deposited by Bowen in one of the banks at Camden, and in the hands of Mr. Shannon: and the value of some Alabama lands. All of the property which was susceptible of valuation, and as to which any inquiry was made, he valued. It would seem, therefore, that it could not have been as to the actual value of the assigned estate within his knowledge, that the witness was about to be examined. The report of his cross examination, after the justice had overruled the question, furnishes, I think, the clue to the ascertainment of the question put and overruled. The witness stated, "that as to the debtors mentioned in the schedule, he had no knowledge of the solvency of many of the persons who were put down as debtors; that he had not examined the papers turned over to him."—And therefore it was, I conclude, that he could not give any opinion as to the general value of the assigned estate. In this point of view, the commissioner of special bail was right in overruling the question. For if answered one way or the other, it would be a mere guess, and could not be considered as any sort of evidence. Looking to this explanation as the true state of the matter before the commissioner of special bail, the first ground cannot be considered as furnishing any reason for a new trial. But if it was more doubtful than it is, how the matter stood before the commissioner of special bail, still, after it is seen that the witness could not have answered from the want of information, the question put to him, the fact that the commissioner overruled it when he ought to have permitted the witness to answer, that he was unable to give any opinion, is no cause why the case should be sent back. We see that the answer would have been nothing—and hence to send back the case would be a merely idle ceremony.

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The first ground is really the only important one in the case.— Before I commence the regular discussion of it, I would observe, that until the formation of the firm of C. C. Campbell & Co., Bowen, the prisoner in execution, was not worth any thing. That firm it is now alleged, is insolvent to a great amount; but their assets are either included in the assignment executed by Bowen and Bishop, or in the schedule filed by Bowen. The bulk of the property and assets covered by the deed of assignment, is the private estate of Dr. Bishop. So that in point of fact, instead of the assets of the firm of C. C. Campbell & Co. being diminished by being applied to the payment of Dr. Bishop's private debts, his estate furnishes a more than ample fund for that purpose, and will contribute largely to the payment of the debts of C. C. Campbell & Co. Their creditors ought not therefore to complain, that Bowen united in the execution of the deed. He was doing them no prejudice—instead of it he was directly benefitting them. For by the execution of the deed, he was at once bringing Dr. Bishop's estate, (upon which his private creditors had liens, and which had it not been for the assignment, they might have sacrificed, and thus have deprived the creditors of C. C. Campbell & Co., of all benefit therefrom,) into a common fund, out of which they in their order might expect payment. According to the case of *Niolon v. Douglass and others*, 2 Hill. Ch. R. 443, 446, the debtors might legally execute such a deed of assignment as that which they did: and that the trusts contained in it to pay some creditors in preference to others, did not make it fraudulent and void. The act of 1828, p. 32, undertakes to regulate assignments, "whenever any debtor shall assign his, or her property, for the benefit of his creditors." This shows the sense of the legislature, that these voluntary assignments were proper: and when that is followed up by the decision of the Appeal Court, that such an assignment may be upon trusts, preferring in the order of payment one creditor to another, how can that which is thus legalized and made superior to exception, be considered as an undue preference under the prison bounds act? It is unnecessary to examine this question. The 7th section of the "Act to establish the bounds of prisons or common gaols in this State," (P.

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L. 456,) prohibits the discharge of any prisoner, "who within three months before his, or her confinement, or at any time since, has paid or assigned his estate, or any part thereof, to one creditor in preference to another." A subsequent part of the same section, characterizes this preference as an "undue preference." The assignment in this case, it must be borne in mind, is not to one creditor—it is to assignees, one of whom happens to be a judgment creditor, and who is not preferred beyond the position which his lien gave to him. The deed is not a payment, or assignment of the estate, to one creditor; it is for the payment of all the creditors, in an order established by it. It is not prohibited by the words of the prison bounds act. Does the trust make it an undue preference of one creditor to another? In *Walker v. Briggs*, 1 Hill. R., 128, I stated my notion of an undue preference to be, "such an *intentional* preferring of one creditor, as may enable him to receive payment and altogether defeat, delay, or hinder, another from being paid." This is, I still think, a just definition of an undue preference. To be within it, the preference must be fraudulent: and this is what is said by the subsequent cases. The intentional preference of one to another, so as to altogether defeat, delay, or hinder, another creditor from being paid, presents all the ingredients which make out a fraud, at either common law, or under the statutes to prevent fraudulent conveyances.

In this case the intentional preference of some creditors to another, cannot be denied: but this is not enough. Was it so done to defeat, delay, or hinder? It is plain it was not. For the fund provided by the deed, with the other property of the assignors, may yet pay the plaintiffs. If this should turn out to be the case, there can be no pretence that they have been defeated. It is apparent that the assignors supposed that they had provided ample means for the payment of all their debts. The words of the deed sufficiently indicate this. Does the assignment delay, or hinder, the plaintiffs in the collection of their debts? Unquestionably it does not. It rather facilitates than delays. For by the deed, assets are placed in the hands of the assignees, which could not be reached by the ordinary process of execution. These reasons

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satisfy me that there was not in law, on the face of the deed of assignment, an undue preference of one creditor to another : and hence, as the jury have negatived its existence on the facts, there is now no pretence to say that it existed.

The motion for a new trial is dismissed.

EVANS, EARLE and BUTLER, Justices, concurred.

S. Mayrant & W. F. Desaussure, for the motion.

Withers, contra.

[In the succeeding case, the want of a plat connected with the papers, renders the precise points upon the question of location, scarcely intelligible. A plat seems to have been exhibited to the Court of Appeals, upon the argument of the case, and is referred to in their opinion ; but none has come to the hands of the Reporter—and he has been obliged to report the case as well as he could without one.]

WM. JOHNSON v. A. M'ILWAIN.

The action of trespass, *quare clausum fregit*, is the appropriate action for a violation of the plaintiff's possession of lands. If he be in the *actual occupancy*, he can maintain the action *without title*. If his possession be *constructive* only, and not actual, he cannot maintain it without proof of title.

In the execution of a writ of *habere facias possessionem*, the sheriff should put the plaintiff into full possession ; and to do this, he may put out not only the defendant, but all others, *it seems*, who are in possession. This he is authorised to do by the writ ; but the *title* of no person is in any way affected, except that of the defendant and those who hold under him.

One of the rules of *location* is, "that the line shall be run according to the boundary ; and that the boundary is to be observed, although the course be different." In *Atkinson v. Anderson*, 3 M'Cord. R., 323, it was held, "that where a junior grant called for a senior as a boundary, the boundary should be followed, although it was a zigzag instead of a straight line,"—and in *Martin v. Simpson*, Harp. R. 455, it was decided "that where the

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boundary called for, extends only along a part of the line, then the boundary is to be observed as far as it goes, and the balance of the line is to be run according to the course called for on the plat.

Before EVANS, J., at Lancaster, Spring Term, 1839.

THE following is the report of this case by his honor the presiding judge :

“This was an action of trespass, *quare clausum fregit*. Two questions were made. 1. Could the action be maintained? 2. Was the land included within the plaintiff's title? The facts upon which the first question depends were these: The plaintiff claimed the land as granted to one Fennell, 1st January, 1787. After the date of the grant, one M'Ganah occupied the land for forty years; from him there was a regular title to one Hugh M'Rory, who bought in 1826.—M'Rory left the State without paying for it. It was sold under executions in attachment, and purchased by the plaintiff. On the Fennell grant, there was a large plantation, parts of which had been occupied for many years. The field in dispute was cleared by Mr. Brey, eight or nine years ago; and at the time the plaintiff purchased, it was enclosed with the other lands by a common fence. After M'Rory ran away, one Allen went into possession under a contract with Twitty, who was M'Rory's security for the purchase money. Allen was in possession when Johnson, the plaintiff, bought. M'Ilwain sued Allen after Johnson purchased. Allen made no defence, and M'Ilwain recovered, of course, as his surveyor thought the land included in his grant.—After the recovery a writ of possession issued, and the sheriff put M'Ilwain in possession, in March, 1837: that is, I understood it, he went on the ground, and no person being on the land in dispute, he told the plaintiff, M'Ilwain, he put him in possession. Pending the suit against Allen, Allen gave notice to Johnson, and Johnson was about to interfere and set up his title, but was prevented from doing so, by M'Ilwain telling him he would never disturb him, his object was to recover against Allen. In April, soon after the sheriff put M'Ilwain in possession, he planted the land, but without in any way detaching it from the rest of Johnson's land. The only

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fence around it was Johnson's fence, which inclosed the rest of his fields. Johnson ploughed up what M'Ilwain had planted and planted the land himself. This was ploughed up by M'Ilwain. Johnson again ploughed up what M'Ilwain had planted, and planted the land himself. This remained undisturbed till August, when some one entered in the night and cut down the corn when it was fully grown. Whether this was done by M'Ilwain, was one of the facts submitted to the jury. I considered the land was in Johnson's possession. It was within the same enclosure with his other fields, and he had the same possession of one as the other. His possession was in no way affected by the writ of possession against Allen, and, besides, it was expressly agreed by M'Ilwain that he would not disturb him by a recovery against Allen. If M'Ilwain, when he was put into possession by the sheriff, had made a fence around it and thereby detached it from Johnson's possession, then Johnson might have been driven to his action of trespass to try title; but this was not done. The recovery against Allen did not affect Johnson's title, and if he could have maintained trespass, *quare clausum fregit*, before the sheriff went on the land, he may do it afterwards. For these reasons I refused a motion for a nonsuit on the ground that the action was misconceived.

On the second question, which depends on the rules of location, I can only make myself understood by reference to the plat, which I suppose will be produced. The defendant claimed under a grant to one Nelson. The plat called for the Rogers grant as a boundary. The corner of the Rogers grant was a hickory, and the Nelson grant called for a hickory as a station. The course of the two lines was the same; but the Nelson line was longer than the Rogers line. Buckeloo, under whom M'Ilwain claimed, pointed out the hickory as the corner of the Rogers grant and a station of the Nelson. Besides this, the hickory is represented on the Nelson plat as near a branch. This is the fact with regard to the one in controversy. Thompson, one of the surveyors, thought it marked both as a station and corner; but Scarst, the other surveyor, thought otherwise. On the plat, the hickory corner at C. and the post-oak at F., are conceded to be corners of the Nelson

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grant. From C. the course will go to the Rogers grant at B.—The whole controversy was, how the line should be closed from B. and F. I was of opinion, and so charged the jury, that if they were satisfied the hickory was the station called for on the Nelson grant, then the true location was to run the course called for, from B. to the hickory at A., and then continue the line the same course until it intersected the line from along the course from F., which it would do at X. In this way the course and boundaries of the plat were preserved, and the only alteration made on the plat was to shorten the length of the line from the post-oak at F. This was the location established by the jury. The defendant contended, first, That the hickory was not the one called for by the Nelson grant; and as it was the older grant, he had a right to give it that location, which would give it the greatest quantity of land which could be included within any of the descriptions in his grant, and, therefore, if the hickory was not his station, he could take his distance on the line from F., and thus close by a line through the Rogers grant to B. Secondly, If the hickory at A. was his station, he was not to continue the course beyond his boundary, but from the hickory might run along the other line of the Rogers grant to G., where the course from F. would intersect that line of the Rogers grant. This mode of locating the land would give the distended triangle to the defendant. This mode, it was contended, was in conformity with the principles of the case of *Atkinson v. Anderson*. That case, however, established no new rule; it is only an illustration of an old one—that boundary, as far as it goes, will govern course and distance; but when you get to the end of the boundary, the course must be resorted to.

I do not recollect what damages the jury gave. The jury were instructed, that if M'Ilwain cut down the corn at night, in the month of August, when it was nearly made, the jury ought to give full value, and they might, if they thought the case required it, add something to that sum by way of punishing the defendant."

The defendant appealed, and now moved this court for a non-suit or new trial, on the following grounds:

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1. Because there was no evidence of plaintiff's possession of the premises, before the trespass complained of,

2. Because it was clearly proved by plaintiff's own testimony, that M'Ilwain was in the actual *pedis possessio* of the premises, and put there by the sheriff at the time of plaintiff's entry and of the trespass complained of, consequently trespass *quare clausum fregit*, will not lie without evidence of title.

3. Because even if the verdict of the jury, under which defendant was put in possession, was wrong, or could not affect the rights of plaintiff, still as it placed the plaintiff in the actual possession, the action cannot be maintained.

4. Because it is submitted, his honor erred in refusing the motion for a nonsuit, because the premises were embraced in one common enclosure with other fields of the plaintiff, (of which there was no proof till after the motion was made,) when there was no proof he had ever actually occupied the premises, and when it was proved defendant was in the actual possession.

5. Because his honor erred in charging the jury, that by the rules and principles of location, the defendant's grant must be closed by running a straight line from to that being the course of the original grant, when it is submitted he ought to have charged, that as a pine corner was called for on the Rogers' line boundary, beyond the point that boundary must be pursued, regardless of its departure from the original course, until it would intersect with a line run from to G.

6. Because the damages are excessive.

CURIA, per EVANS, J. There is little difficulty in this case, except on the question, how the lines are to be closed from the black jack corner at B, and B oak at F. In deciding this question, it must be borne in mind, that the Nelson plat calls for the Rogers grant, as a boundary, and not only represents that the Rogers grant lies on that side of it, but calls for the same course and a hickory station, old mark, near a branch, which on resurvey is found to be the corner of the Rogers grant. Then, according to any

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principles upon which locations are made, the line from B must run along the line of the Rogers grant to the hickory at A. In this way, the course, and the marked trees, are both preserved. But the boundary terminates at the hickory station, and the whole controversy between the parties is beyond this point. I take the rule to be this: the line is to be run according to the boundary, and the boundary is to be observed, although the course be different. In the case of *Atkinson v. Anderson*, 3 M'C., 223, it was held, that where a junior grant called for a senior as a boundary, the boundary should be followed, although it was a zigzag, instead of a straight line. In *Martin v. Simpson*, Harp. 455, it was decided that, where the boundary called for extends only along a part of the line, then the boundary was to be observed as far as it went, and the balance of the line was to be run according to the course called for on the plat. According to these principles, these lines were correctly run by running the line from B to the station at A, and thence continuing the true course to X, where it intersected the line run along the course called for from F. In this way, the form of the plat is preserved, the course is preserved, and the marked trees are preserved. To locate the Nelson grant as contended for by the defendant's counsel, so as to include the triangle, A F G, (the subject of dispute,) would lead to a violation of the established principles of location. It can be done only by one of two ways—1st. By running a straight line from B to G, the point where the distance from F is supposed to terminate. The effect of this would be, to run through the Rogers' grant, to depart from the course, and wholly to disregard the marked trees, for the single purpose of preserving the length of the line F G. 2d. At the station A, to change the course of the line, and run from A to G, the effect of which would be, to add a sharp cornered triangle to the form of the original plat, and to convert the straight line, A X, into the two lines, A B and A G, which are nearly at right angles to each other. This cannot be done, unless the pine corner, called for in the plat, had been found. In which case, it is conceded, the course must yield to the marked trees. If this corner had been found at G, or at any other point on the line F G, then the course would be changed at A, so as to connect the hickory station with

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the corner by a straight line. But as the pine corner is not found, the lines can be closed in no other way than by running lines along the courses until they intersect.

The defendant's counsel seemed to entertain a notion that, because the Nelson grant called for the Rogers grant as the boundary along the whole line on that side, he had a right to follow the boundaries of the Nelson grant to any point where the line from F would intersect. This would be true, if the pine corner was found in the line A G, or the line from A ran in such direction as still to leave the Rogers land a boundary on the same side. But this is not the case. If the course is changed at A, and the line A G be adopted instead of the line A X, then the Rogers grant becomes a boundary on two sides, instead of one. The only remaining question is, whether the plaintiff had such possession as enabled him to bring an action of trespass *quare clausum fregit*. The motion for a nonsuit on this ground was made before the plaintiff adduced his title, and should have been granted, unless the plaintiff had such possession as would enable him to maintain this action. The facts were these:—The plaintiff was the owner of a tract of land, granted to one Fennell, which covered the land in dispute, unless it was included in the defendant's older grant. He purchased it at sheriff's sale, as the property of M'Rory, who had run away. After M'Rory ran away, one Allen got possession, but without any title. Before the plaintiff purchased, the defendant sued Allen in an action of trespass to try the title, which was pending when the sheriff sold. The plaintiff was about to interpose his title, to protect Allen against the defendant's action, but desisted on the defendant's promise that his recovery against Allen should not affect the plaintiff's right. Allen abandoned the possession, and on the trial of the case, M'Ilwain recovered against him. A writ of possession issued, and the sheriff went with it, and finding no person there, he told M'Ilwain he put him in possession. On the Fennell grant there was a large plantation of cleared land enclosed within a fence. The land in dispute was within the same enclosure. The plaintiff's house was within the same common fence, and at the time the sheriff went on the land with M'Ilwain, the plaintiff had the same possession of this land that

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he had of the rest of the cleared land. After M'Ilwain was thus put into possession, without making any fence around it, so as to detach it from the rest of the field, he planted it in corn. The plaintiff ploughed it up and planted corn himself. This was ploughed up by defendant, who again planted the land. This was ploughed up a second time by the plaintiff, and the land planted and cultivated until August, when the defendant entered in the night time, as was alleged, and cut down the corn when it was fully grown. For this trespass the action was brought, and the question was—could trespass quare clausum fregit be maintained *without proof of title*? This form of action is used for a violation of the plaintiff's possession; if he be in the actual occupancy he can maintain the action without title. If his possession be constructive, and not actual, he cannot maintain it without proof of title. I think in this case there can be no question that the plaintiff was in the actual possession of the land at the time the sheriff put M'Ilwain into possession. I do not think the plaintiff's possession was at all affected by that act, because, in the first place, there was an agreement to the contrary; and, secondly, because nothing was done to oust the plaintiff's possession. In the execution of the writ of possession, the sheriff should put the plaintiff into full possession; and to do this, he may put out not only the defendant, but all others who are in. This he is authorized to do by his writ; but the title of no person is in any way affected, except that of the defendant, and those who hold under him. I think, however, it is unnecessary to discuss this part of the subject. There can be no doubt that at the time the corn was cut down and destroyed in August, the plaintiff was in the actual occupancy of the land, and that he was so before the defendant acquired any possession. He had, therefore, the oldest and the present possession when the trespass was committed, and could, therefore, maintain this action.

The motion is therefore dismissed.

RICHARDSON, O'NEALL, EARLE and BUTLER, Justices, concurred

Wright, for the motion.

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CARMA PARNELL v. W. W. KING and JNO. YARBOROUGH, (trespass.)

SAMUEL WILSON v. CARMA PARNELL, (assumpsit.)

SAMUEL WILSON v. J. W. P. M'KAGIN, (process in trover.)

That a case pending in court has been referred to arbitration by the mere agreement of the parties, *and not by a rule of court*, constitutes an insurmountable objection, if presented to the Circuit Court, against the *confirmation* of the award.

There were several cases pending in the Court of Common Pleas, to wit: an action of *trespass* in which *Carma Parnell* was plaintiff, and *W. W. King* and *Jno. Yarborough* defendants; an action of *assumpsit* in which *Samuel Wilson* was plaintiff, and said *Carma Parnell* defendant, and a *summary process* in trover, in which said *Samuel Wilson* was plaintiff, and *J. W. P. M'Kagin* defendant. By agreement among the respective parties to these suits, and under a rule of court, they were referred to arbitration; and as the result of the consideration of the arbitrators, of the matters submitted to them, they *awarded* that *Samuel Wilson* should pay to *Carma Parnell* the sum of two hundred and fifty-five dollars. HELD, that in the state of the pleadings in the cases, the award could not be confirmed.

“Arbitrators are not bound by technical rules in the formation of an award;” but notwithstanding this is the case as to the arbitrators themselves, still the court can not give effect to their award, as a judgment, if it violates the rules by which the court is governed in the rendition of its own judgments.

The court could not render judgment for a sum of money in favor of a defendant against the plaintiff, unless upon a *discount*—and where in an action of *assumpsit*, the arbitrators awarded a sum of money to be paid by the plaintiff to the defendant, in which no discount was pleaded or set up, the court refused to confirm the *award*.

Before GANTT, J., at Darlington, Spring Term, 1839.

The report of his honor, the presiding judge, is as follows:

“The above cases, involving questions respecting the same subject matter or right, had been referred to arbitration, and the arbitrators returned their award, which, on motion of Mr. Sims for that purpose, was confirmed by the court. The motion was

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opposed on the ground, *that such judgment is incompatible with, and repugnant to the pleadings and the records in the foregoing cases, and has the effect of substituting parties, and altering their position on the records.*

I did not consider that the arbitrators were bound by any technical rules in the formation of their award, and as no objection was raised against the correctness of the award made, other than as above, I saw no reason why it should not be made the judgment of the court, and ruled accordingly."

G. W. & J. A. Dargan, in behalf of Samuel Wilson, appealed from the decision below, and now moved this court to set aside the order of the Circuit Court making the award of the arbitrators in these cases the judgment of the court; on the ground that such judgment is incompatible with, and repugnant to the pleadings and the records in all the foregoing cases, and has the effect of substituting parties, and altering their position on the records.

George W. Dargan, for the motion. These cases were submitted to an arbitration. The arbitrators awarded that Samuel Wilson should pay to Carma Parnell, \$255. An order was made by the court, that this award should be made the judgment of the court. I have been anxious to see what form of judgment would be invented by the appellees counsel to suit the case, or rather cases; in what way these actions, each of them in a different form and between different parties, are to be amalgamated and blended together, so that an award, that Samuel Wilson should pay Carma Parnell \$255, should become the judgment of the court in all of them. I am at a loss to conceive such a judgment. If the inventive ingenuity of the age can frame one, sanctioned by the courts of this State, it will form an era in the history and system of pleading. The order must be reversed. It is impossible that a common judgment can be rendered in the three different cases, each in a different form of action, and each between different parties. It is impossible that an award, that Samuel Wilson should pay C. Parnell \$255, should be made a judgment of the court in a case of C. Parnell v. W. W. King and Yarborough, when the award was not against King and Yarborough. It is impossible that this award

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should be made the judgment of the court in the case of Samuel Wilson v. M'Kagin, which was a summary process for trover.— It cannot be made the judgment of the court in the case of Samuel Wilson v. C. Parnell, because the action was by Wilson against Parnell, and not by Parnell against Wilson. Parnell, on the re-record and in the pleadings, claimed nothing of Wilson. Wilson claimed damages of Parnell and not Parnell of Wilson; and how can the court give a judgment for Parnell beyond the costs of suit. Such a judgment is unknown to our system of legal proceedings, except in the single case under our statute law, where in an action *ex contractu*, the defendant gives notice of a discount, which is quasi a cross action. The plea here is the general issue, (see copy of record,) and no notice of discount filed. What is a judgment? It is the decision and sentence of the law, delivered by the court, between the parties to the suit, on the matter contained in the record and set forth in the pleadings, (Jacob. Dic., title Judgment). Is there any thing in the record which would authorize the court to give a judgment in favor of Parnell v. Wilson? Is it pretended in the pleadings that he owes Parnell a cent, or that Parnell has sustained damages by him to the value of a cent? How can the court then proceed to give judgment against him as plaintiff in the action, except for costs. The award, in fact, is not within the terms of the submission. What was submitted?

We will proceed to analyse the case: The case of Parnell v. King & Yarborough, was submitted; the matters contained in that action were submitted. It was an action for certain trespasses, alleged by the plaintiff to have been committed against him by the defendants, King & Yarborough. The arbitrators do not find that King & Yarborough committed the trespasses, or that Parnell has sustained damages from King & Yarborough. There was nothing of record in this case which involved Wilson's acts or responsibilities, and therefore, so far as this case went, there was nothing submitted which could authorize the award against Wilson.— There was no general reference of all matters in dispute between the parties; and if there had, it could not be made a judgment of the court in the actions, except so far as the actions embraced the

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causes of the controversy in these cases. "The cases," that is, the matters involved in the actions, were submitted. See 2 Sellon. Prac. 351, where it is said, "it is material to observe the distinction between a submission to arbitration of all matters in difference between the parties in the cause, and a reference of all matters in dispute in the cause between the parties; for the former being general, is not confined to the subject matter in the particular actions then depending, but will extend to cross demands between the parties, though not pleaded by way of set off; and the costs being to abide the event, will make no difference; but the latter is confined solely to the matters in dispute in that particular case.— See Tidd's Prac. 2 vol. 746. In *Owen v. Hurd*, 2 T. R. 643, a submission to arbitration between A. and B., the parties on record, having been made a rule of court, which award not having been made in due time, the dispute had been referred a second time, by B. and C., the real parties in the suit, no attachment can issue against B. for not obeying the award made by the second arbitration, because the reference should be made by the parties on record, and even if it had, there should have been another rule to make the second submission a rule of court, and as the court had no jurisdiction in the case, they could not go into the merits, though B. consented to waive the objection. So in this case, the matters referred being the matters contained in the three suits, the arbitrators could not travel out of the record and go into a general investigation of all matters in dispute. Sellon, in his treatise on Practice, 356, says, "to render an award legal and effectual, it should be made agreeable to the submission of the parties, it should not extend beyond it, neither to any matter not included in it, nor to any person not a party to it, nor should it be only parcel of the things submitted." Parnell has by his action claimed nothing, except from King & Yarborough, and the award gives him damages against Wilson; and supposing that Wilson is the real party, and that an action may perhaps be sustained against him on this award, yet he not being a party in any case in which Parnell, on the state of the pleadings, could by possibility, according to the rules of pleading, have recovered against him damages, such award cannot be-

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come the judgment of the court, and Parnell will be turned over to his action. The court, as in the case of Owen v. Hurd, not having jurisdiction, cannot go into the merits.

This order was made by the presiding judge, under the impression that there had been a rule of court referring the cases to arbitration; but there was in fact no such rule.—(See certificate of clerk.)—The reference was made by the parties, by private arrangement among themselves. *In no case* will the court, when the submission has not been by an order of court, enforce the award either by attachment or by making it the judgment of the court; but in all such cases the court will leave the parties to their remedy by action, or bill in equity.—1 Salk. 83, Tidds. Prac. 755, 760. See Sellon's Prac., 2 vol. 343, et seq. Even when an award is made under rule of court, it is not the practice to make the award the judgment of the court; but simply to confirm it and enforce it by the process of attachment. See *ibid*.

Sims, contra.

CURIA, per O'NEALL, J. The ground taken in the argument, that these cases were referred to arbitration by the agreement of the parties, and not by rule of court, would have been, if presented to the Circuit Court an insurmountable objection to the confirmation of the award. But no such ground appears to have been then taken. Indeed, the order of confirmation recites a reference by rule, and the report of the judge below notices only a single ground on which the confirmation of the award was opposed. I do not, therefore, think that the party can now make that objection, but I agree with the appellant, that the award in the present state of the pleadings, in the cases, cannot be confirmed. In two of the cases, Wilson is the plaintiff, and in another, Parnell is the plaintiff against other defendants. In the cases to which Wilson is a party, one of them is a summary process against M'Kagin: in the other case, he is plaintiff, and Parnell is defendant: this last case is an action of assumpsit: the other is an action of trover. The other case between Parnell and other defendants is an action

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of trespass. As to this case, and the summary process in trover, the award does not touch them, in terms, and of course cannot be made a judgment in them. In the action of assumpsit between Wilson and Parnell, there is no discount which would alone justify the court in giving a judgment for a sum of money in favor of the defendant. I agree with the judge below, that "arbitrators are not bound by technical rules in the formation of their award;" but notwithstanding this is the case, as to the arbitrators themselves, still the court cannot give effect to their award, as a judgment, if it violates the rules by which the court is governed in the rendition of its own judgments. It may be, and I think it is so, that Parnell will be entitled to recover the amount awarded in his favor by an action on the bond of Wilson. So, too, it may be, that by pleading the award in bar of the cases in which Wilson is plaintiff, he may prevent a recovery in them.

The motion to reverse the decision of the judge below, and to set aside the order, confirming the award, is granted; and the defendants, Parnell and M'Kagin, have leave, if they choose to do so, to plead puis darrein continuance the award in bar of the actions of Samuel Wilson v. Carma Parnell, and Samuel Wilson v. John W. P. M'Kagin.

EVANS, EARLE and BUTLER, Justices, concurred.

CASES AT LAW,
 ARGUED AND DETERMINED IN
THE COURT OF ERRORS
 OF
SOUTH-CAROLINA,
 FROM DECEMBER, 1838, TO MAY, 1839,
 INCLUSIVE.

THE L. C. & C. R. R. COMPANY v. J. J. CHAPPELL.
THE SAME v. Dr. REESE and Mrs. REESE.

The 35 § of the act of 1835, (acts of 1835, p. 54,) incorporating the Louisville, Cincinnati and Charleston Rail Road Company, provides, "that where any lands or right of way may be required by the said company, for the purpose of constructing their road, and for want of *agreement* as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, *the same may be taken* at a valuation to be made by commissioners, &c. **HELD**, to be constitutional.

All the writers upon the fundamental principles of national societies agree, and it has now become a principle of universal law, that *private property*, whether real or personal, may be taken for *public use*, upon just compensation to the owner. This doctrine has been uniformly recognised in this State. See the cases of Lindsay v. Comm'rs, 2 Bay, 38; Ford v. Whitaker, 1 N. & M'Cord, 5; M'Gowen v. Starke, 1 N. & M'Cord, 387; Comm'rs v. Singleton, 2 N. & M'Cord, 528; Eaves v. Terry, 4 M'Cord, 125; and State v. Dawson, Riley's Coll., 103.

The exercise of such a power belongs to the *eminent domain* of the State, and it devolves upon the legislature to decide in regard to great works of improvement, whether the public benefit is of sufficient importance to justify the exercise of the *eminent domain* in *such cases*.

And the only restriction is, that private property cannot be *taken*, without just compensation to the owner.

The exercise of this power in relation to the Louisville, Cincinnati and Charleston Rail Road, is to be found in the authority conferred in the

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charter upon the company to lay out and construct a road between the given *termini*: and in the actual construction of the road the company are to be considered *so far* the mere authorised agents of the State, to execute the power conferred.

The Louisville, Cincinnati and Charleston Rail Road is to be considered as a *great public improvement*, and when made, a *public highway*, and the legislature may appropriate *private property* for such improvement, or authorise a corporation *thus* to appropriate it, upon full compensation to the owner.

The 37th clause of the act of incorporation, provides a full and ample mode of compensation to the land owner, for any loss or damage he may sustain by the company, in taking his property, in which the trial by jury is preserved, and which constitutes the proper tribunal for the decision of such questions.

These cases came up on an appeal from the decision of his honor, Judge Richardson, made at Fall Term, 1838, in the Court of Common Pleas, for Richland District. As the questions arising in the cases involved the constitutionality of an act of the legislature, the appeal lay directly to the Court of "Errors," organized under the act of 1836. In order to the better understanding of the cases, the report of his honor, Judge Richardson, is given at length, and is as follows:

"In these cases, the Rail Road Company claimed the right to take the defendant's land, for constructing the road. The use of the land was not objected to, provided the route should be so located as to do the defendants the least possible injury; but the company refused to take a relinquishment on these terms, and insisting to locate the route as they pleased, filed a petition to the court, praying the appointment of commissioners, to assess the damages to be sustained by the defendants; and served notices to show cause why the same should not be done. The following cause was shown:

That in the case of the first named defendant, he had offered in writing, to the President of the Board of Directors of the Company, to cede the right of way gratuitously, if the company would locate the road on his land, on the south side of the track; but if they would not do this, and insisted on occupying the location de-

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signated by the engineers, which so intersects it as to cut it into three fractions, then the company must pay a specified sum, and if both these should be declined, then the work must cease, as regarded his land. The president afterwards informed this defendant in writing, that the directors had *decided* that the location designated by the engineers, was *necessary* for the road, and that that location was *established*. The work has, however, progressed on this defendant's land, contrary to his wishes, and against his positive orders.

In the case of the other defendants, they were willing to cede the land necessary for the road, and even to pay a sum of money to the company, if the route should be so located as not to destroy the dwelling and settlement. But the company determined to take the route designated by the engineers. In this state of things, the petitions are presented.

The defendants object to the authority of this court, to appoint commissioners to value their land, because that section of the act of incorporation, which gives the right to take such lands, or right of way, as the company may require, is contrary to the constitution of the United States. It proposes to vest in the company, the right to take any man's property for private use ; to interfere with, and destroy vested rights ; to confer a despotic power on a corporation, which is alike inimical to civil liberty and equal rights, and which neither the legislature can authorize, nor this court rightfully enforce.

If, however, it shall be determined that the law is constitutional, yet this court will interfere, and require the company to exercise the authority, with a due regard to the rights of those whose land may be required.

In these cases, the route proposed to be ceded by the defendants, would not lengthen the road more than one hundred yards at each place, and in a part of the way, would be on ground requiring less embankment, and is altogether practicable. But it is said it would impose additional cost on the company, and would require curves in the road. In the first stated case, there is already a curve, and it would require it only to be a little extended.

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After argument, the presiding judge delivered the following opinion :

The charter of the Cincinnati, Louisville & Charleston Rail Road Company authorizes the company to lay out a rail road from Charleston, to Lexington, in Kentucky ; and to purchase the land required for the track of the road. The State of South-Carolina has granted the charter, jointly and severally, with the States of North Carolina, Tennessee and Kentucky. Where the company cannot agree, in the value of the land, with the freeholder, they are authorized still, to construct the road ; and to have the value assessed, by five commissioners, to be appointed by this court. And, if either party should be dissatisfied with the assessment, he may appeal to the court and a jury, for the final assessment ; which is made conclusive and binding ; and the land vested in the company, upon payment of the money. The company have marked out the road from Branchville to Columbia, in South-Carolina. But in the instances before the court, the parties could not agree upon the value of the land. Whereupon a rule was served upon the defendants, to show cause, if any they could, why five commissioners should not be appointed, according to the terms of the charter, &c.

The defendants showed cause in writing, which will be exhibited to the court.

The objections to the appointment of commissioners consist in the following allegation : That the power given to the company, to construct the rail road over the land of individual freeholders, is contrary to the constitution of the State of South-Carolina, and that of the United States. Because—

1. The charter endows a mere private, and not a public corporation ; and private property cannot be taken for the use of such corporation ; even upon full compensation.

2. That, even if the land be considered as taken for public purposes, the legislature cannot transfer to such a company, its constitutional power, or eminent domain, to take private property for public purposes, against the consent of the owner, with, or without compensation.

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3. That, in any event, the company ought to be constrained to lay out the road, so as to put the freeholder to the least inconvenience and loss ; notwithstanding it might cause greater expense to the company, in the construction of the road. And

4. That the compensation to the freeholder ought to be made before the land can be taken, and the road constructed.

The primary question of the case is readily disposed of. All the writers upon the fundamental principles of national societies agree in this position : that private property, real or personal, may be taken for the public use, upon full compensation made to the owner. 1 Black., 139 ; 2 Kent, 270 ; 3 Story Const., 661 ; Tucker's Appendix, 304 ; 3 Wilson, 303 ; Vattel b., 1 ch. 20, p. 244 ; Puff. b. 8, ch. 5, 13, 7 ; Bynk., c. 15 ; 3 Dallas, 195, 2 D. 34 ; Peters, 99, 111, &c. ; Rawl. 128, &c. In our adjudications, the position has been uniformly allowed, as undeniable. *Lindsey v. Com'rs*, 2 Bay, 38 ; *M'Gowen v. Starke*, 1 Nott & M'C., 387 ; *Eaves v. Terry*, 4 M'Cord, 125 ; *Ford v. Whitaker*, 1 N. & M'C., 5 ; *Com'rs v. Singleton*, 2 N. & M'C. 528 ; *State v. Dawson*, Riley's Collection, 103.

Some of those cases, in fact, go farther, and do not require compensation, as a strict right of the freeholder. The 7th article of the Amendments to the Constitution of the United States, &c., "nor shall private property be taken for public use, without just compensation," is a plain recognition of the same principle. And it may be now taken, as a principle expressed, or implied, in every one of our State Constitutions. "It is a principle (says Judge Story, 3 vol., 161) of universal law."

But, I had occasion so lately, in the case of the *State v. Dawson*, (Riley's Col. 103,) to discuss and present the authorities, that I will now content myself with referring to that argument, and noting the authorities.

First, then, can private property be so taken by public authority, for the use or emolument of a mere private corporation ?

I am not aware that such a point has been specifically adjudged in South-Carolina. But, if the question mean, can the property of one individual citizen be so taken, against his consent, for the

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exclusive use of another, or of a private corporation, I would readily answer it in the negative ; even when sanctioned by an act of the legislature.

But, as this is the point upon which several defendants, in similar cases, have exhibited strong feelings, I will attempt to disabuse their understandings of such a misconception of the charter to the rail road company, by a brief analysis of what practical government consists.

Man and his powers, moral, intellectual and physical, constitute the elements of all governments—man and such of his powers as are organized and digested in a national constitution, make the particular State government, and indicate its character and authority. And beyond the authority so given, the government cannot go. The government is itself controlled by the constitution. But the practical use of all such authority, through the means of human agents, constitutes the indispensable administration of the government.

No one will deny, at least the last proposition. Governmental power must be administered, and practically used.

Now, by virtue of the charter of the rail road company, land is taken for the purposes of a public way : not for the use of a corporation ; but, for the convenience of travellers, and for the transportation of goods and merchandize.

The fact that the toll, freight and emoluments are to go to a private corporation of individual stockholders, instead of the public coffers, does not alter the character of the road. It is not less a highway.

The land is taken for a public road of a peculiar character, requiring great art, skill and labor for its construction ; and the company, who construct the road, and keep it in repair, at their own expense, receive their compensation, by an assignment of the public right to receive the same, of individual travellers, and freighters.

The company are mere agents, to do the work. Such is the case with every keeper, or lessee of a toll-gate, or a turnpike road, for keeping a part of the road in repair,—with every owner of a

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ferry, or public bridge, for his services, in keeping it in good order. All these are public roads, or parts of roads. But the legislature can, as well, construct, farm out, or lease a rail road, as any other road. And they have the same right, as individuals, to assign, lease, or vend public property—be it a road, or other subject of property. Every office of the State is of the public property; and consists in a privilege, or public franchise. Yet, the emoluments go to individual officers. To deny to the legislature such a right of assignment, because the emoluments are obtained through public property or an office, would be to deprive the State of the use of its individual citizens, in the one case, and to estop the administration of government in the other.

Every step of national government, and every practical use of public property, requires a salary, or wages to him that administers the authority of office, or guards the property.

To compensate for real services, is, indeed, a primary principle of the American constitutions, as well as to repudiate sinecures. Full compensation for personal services, or property, belongs to governmental protection, and distinguishes free governments.

To say, therefore, that because the company are no more than a private corporation of individuals, they cannot be employed, by the proper authority, to construct a rail road, and to take the emoluments of such way, as a compensation, would be a proposition leading to the absurd consequence of disfranchising the State of rights essential to its practical existence. Upon this head, I would especially refer those, who may still doubt, to the North-Carolina case, of Gaston and Raleigh Rail Road Company v. Davis, in which it is unanimously decided, that the rail road was a highway.

2. But, secondly, can the legislature assign to any corporation, the eminent domain inherent in national societies, to take private property for great public purposes?

This original right belongs exclusively to the association of men, forming national society, but is, from necessity transferred, for the purpose of practical use, to the government of all populous countries, and is limited, or unrestricted and plenary, according to the fundamental rules, by which the people have chosen to bind themselves in a State constitution.

By the constitution of South-Carolina, this high privilege has been transferred to the legislature of the State, evidently, under the restriction that full compensation shall be made to the owner of the property taken for public use. And, from inherent reason, the transfer is coupled with the high trust, that it shall not be infringed in the conditions of the constitution; nor perverted nor abused in any way.

Such high power and special trust plainly imply that the eminent domain cannot be transferred from the primary and specific agent, to whom it has been confided by the constitution, to any secondary hand whatever. Such a transmission would be utterly inconsistent with the letter, the objects, or the ends of the constitution: and at war with well established rules for the construction of trusts and agencies, as well as the practices of governments.

I cannot conceive of a higher judicial power; although placed at the discretion of the legislative department of the government. And a proper sense and conception of the eminent domain, restricted by the condition of full compensation, will be found to be very important, when we come to consider the fourth ground taken, and the application of the trial by jury to the case before us.

But the proper question, for the present, is—has the legislature, in fact, transferred to the rail road company, the privilege of taking private property?

On the contrary, the whole argument arises from a confusion of subjects; which, although associated, are not identical; or, from an indistinctness of thought upon matters, as one; but which are plainly distinguishable.

The whole use of the eminent domain, in the instance before us, is to be found in the enactment, that a rail road shall be constructed between specific termini: and the land essential for its track and construction, shall be released, for the purpose of the road, upon full compensation, be such land whose it may. Surely this is an intelligible and plain exercise of their high privilege by the legislature itself, and not by the company. The provisions, that the precise track of the road, preserving the termini, shall be marked out, and the road constructed by the company, are mere

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executive or mechanical processes ; like the ordinary administrative offices of overseers, surveyors, and operatives, to lay out and open a public road, or erect a public building, upon land before designated, and appropriated to such public use.

In all such cases, the use of the eminent domain is to devote and appropriate the land by the legislature itself. The surveyor then locates the precise spot, from the statutory grant ; and an architect and operatives construct, or build upon the land thus granted, and made public property. But the original statutory grant is alone referable to the eminent privilege of taking the land. This second objection to the rail road charter is, therefore, merely specious, and must yield to the truth.

3. The third objection is, that the company should be restrained to such a track for the road, as to do the least injury to the freeholder. But, assuredly if there be any wanton abuse of power in designating the precise route of the road, the freeholder would have his remedy in increased compensation, or in an action for malicious damages ; and in an extreme case, the remedy by injunction to restrain the company, would be available. But no such inquiry is now before the court. It may come hereafter before the commissioners, or the court and jury, in case of appeal ; or be brought before the Court of Equity. In any such event, the remedies are ample. But this court will not pre-suppose an abuse of the practical power of the company ; when the supposed abuse and consequent injury to the freeholder, will be the main consideration for the commissioners or jury, in assessing the necessary compensation, if such abuse really exist.

This objection is therefore out of time and place ; and must be referred, if any, without prejudice, *ad aliud examen*—to the commissioners appointed, or the jury, if there should be an appeal to that tribunal, who will do the office assigned to them by the charter, and doubtless make the company pay the proper equivalent for the land taken from the defendants ; upon a just balancing between the immediate advantages and disadvantages attending each case. The aim and object will be just and full compensation for the true loss to the freeholder.

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4. The fourth objection is, that the compensation must be made to the owner, before he can be disseized of his freehold for the use of the road, or the land appropriated.

This objection arises from a mistaken and indefinite apprehension of the object, purpose and character of the eminent domain of government.

If that principle pre-supposed any agreement or assent of the individual owner, as necessary before the appropriation of the land, then, an assessment and actual compensation would be required before the divestiture of the citizen.

But the eminent domain pre-supposes a public right to use private property, for public purposes, with or without consent. Such liability inheres in all property, as a moral element of society, in return for the general security and protection of individual rights: for his inviolable civil liberty—the sanctity of his castle—for the guard over his property, in all other respects—for his security in person and character at home—for the guaranty of his enterprises and respectability abroad. It is for such practical equivalents: not through veneration of power, that the sovereignty of government may assess and tax our property; and may assign any property for public purposes, upon a fair compensation upon the same principle that permits taxation. In this way, the appropriation made for all, is paid for by all. And we see one of those glorious checks upon power, which keeps it right in practice, and beneficial. The general principle is, that private property may be taken. The peculiar condition of democratic governments is, that adequate compensation must be made: not that the force of the public privilege is less in free, than in despotic governments: where the property may be taken *without* compensation.

From this simple exposition, it is readily seen, that the property may be converted to the public use, *instantly*, if so ordered by the government; notwithstanding the individual right to compensation.

Were it otherwise, a highway could not be constructed, but after such delay as would be a source of anarchy.

And a private house or enclosure could not be used for a forti-

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fication, upon the most urgent emergency and the common safety. It is upon the same principles that property is not only taxed annually at the discretion of government ; but that the private domicile and castle which are so cautiously protected, may yet be forced open, in the pursuit of criminals. For crimes, and to the public exigencies, all individual rights yield and give place ; and even life may be taken. The state of war illustrates admirably the efficiency of the eminent domain. Not only past contracts with the enemy are cancelled, or at least suspended ; but all trade estopped as if prohibited by the original society and social state of man, and we thus readily perceive how various are the applications of this governmental power.

Reverting back for a moment to the 1st, 2d and 3d grounds taken, it may be seen why the privilege of the eminent domain can be used only by the legislature itself ; but must, of necessity, be at its sound discretion. Its use depends upon the progress, position or exigency of the State. And our own domestic history illustrates how various must be the applications of this high privilege.

When Charleston was first settled, it required much fortification, and many exterior forts. These were erected at discretion, and the whole eminent domain confined to forts and city lanes. The people wanted no highways ; and, accordingly, a ride “ up the path,” to use the early phrase of our mother city, presented the whole road statistics of the Lords Proprietors of Carolina. For a series of years after, Indian paths occasionally opened by the axe, served our frontier herdsman, and were enough for the province.

But, as soon as commerce penetrated into the country, the king's highways were opened along the great rivers. And, with this change of times, roads, bridges and ferries were called for, in rapid succession, while, at every new application, the land holder stood upon his *magna charta* rights. But Lindsey and A. B. Starke, Withers, Eaves, Dawson, and all were taught, successively, how strong and various were the powers of the people's government to devote private property to public uses, even without compensation in some cases. The first road act to open highways, without paying an equivalent to the landholder, is of modern date, (1788,) and

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probably gave rise to many of the adjudications I have noticed, but in which my own judgment never can concur. These decisions go with some exception, upon the principle that the eminent domain is paramount: requires no compensation; and it would seem, may be even delegated by the legislature, as in the road act of 1788, now repealed. If our rail road system stood upon such footing, I should be for much reconsideration of the entire subject. The third direction that has taken place in the use of the eminent domain, was in its applications to canals, and the widening of old, and the opening of new streets in Charleston, in which private property has been properly respected. The legislature, themselves, corrected the former abuse of their great constitutional prerogative; and ordered compensation in all these latter instances, and they clearly deserve our thanks for such respect for the constitutional law, and vested rights. It is a fine instance of the advancement of moral influences. But even this last great improvement in legislation was unsatisfactory, if not deficient, in the omission to refer the question of valuing the lands taken to the proper tribunal of a jury.

But in the law now before us, which lays the foundation of a great and growing system of rail roads, pervading the whole State, the omission has been supplied; and the question of compensation is required to be finally decided by the fixed constitutional tribunal of a jury, instructed by the constitutional judges and subjected to their supervision. Such a system, fairly used, must and will conciliate the whole country. The rail road act comes, therefore, up to the Constitution of South-Carolina, and admirably illustrates the justice and wisdom of Judge Waties' opinion, given very soon after its adoption, in Lindsay's case, (2 Bay. P. 38,) that our constitutions enact compensation, *as a right* of the citizen.

But the principle which requires compensation for private property, taken for public purposes, would have been very incomplete and uncertain without some tribunal beyond the selection or control of the legislature itself; or any dominant majority whatever, in evil times.

The moment compensation is required as a constitutional condi-

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tion, although the property may be instantly taken, the principle unavoidably means a positive right to adequate compensation.— And such right presupposes an independent tribunal to decide upon the amount in money.

Now, then, the 9th article, 6th section of the constitution, declares, “The trial by jury, as heretofore used in this State, and the liberty of the press, shall be *forever* inviolably preserved.” “For ever.” Such terms would seem to indicate, that no power less than a primary convention of the State, can change these particular provisions. But, at least, our rights of property and reputation, are brought within it and inviolably subjected to it, by universal acknowledgment, except in a few particular cases, in which trial by jury would be incompatible with the question made. Why then, I ask, should the absolute right to compensation for property wrested, at discretion, from the owner, be adjudged by any tribunal nominated at the discretion of one party to the controversy only?

The very character of such a case raises a question for severe contestation, before the most inflexible and incorruptible tribunal of justice and the constitution. For illustration, do but call to mind the possible case of another Hamden, or Jinks, before any unconfirmed judicature.

For such reasons, while I rejoice at this new provision and reference in the rail road charter, to a jury to decide, wherever required, upon the extent of compensation; and while I will not say that in the state of our own past adjudications, I would feel myself justified in holding the charter unconstitutional without such a provision, yet, for the same reasons, I cannot concur in that one point with the decision lately made by the Supreme Appellate Court of North-Carolina, in the case of the Raleigh and Gaston Rail Road Company v. Davis, while I do fully concur in every other respect, in that very enlightened and able adjudication, which involves and decides the main points now before this court; and would, I cannot doubt, give great satisfaction, if not entire conviction, to all the freeholders whose cases have been before me, and whom I have failed to convince, that their property has been taken

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for great State purposes, and not assigned over to a mere private corporation. And I must be allowed the foregoing brief reasoning, why I cannot altogether concur in the entire conclusions of that very clear, and in all other respects, convincing judicial argument.

The five commissioners are therefore appointed, according to the rail road charter, and consist of _____ ”

From which order the defendants appealed, on the following ground :

Because that part of the act incorporating said company, which authorizes it to take such land and right of way as it may require, and which vests said land in said company, is unconstitutional, in the following particulars, viz :

1. In vesting said land, which was private property, in the company, and does not vest it in the public.
2. In vesting the road in the company *exclusively*, and not in the public, and is therefore not *for the public use*, but for a private one.
3. In disseizing the citizen of his freehold contrary to the law of the land.
4. In interfering with and destroying the vested rights of the citizen.
5. In giving to the company such privileges and authority as to destroy that equality of rights and laws which is guaranteed to all.
6. And in conferring a power on the company which is oppressive and tyrannical, and which is uncontrollable, unless the court will restrain its exercise, and which is contrary to the spirit of ours and of all free governments. And because, if it be constitutional and right that such a power should exist, the court should so order its execution as to protect the citizen, from great sacrifice of property or feeling, unless it be impossible to avoid it. And the mere inconvenience of the company, or additional cost in constructing the road on a different route from that proposed, is not sufficient to protect the company in the exercise of an arbitrary power, or to prevent the court from restraining that power in favor of the citizen, and of ordering the road to be so located as to do the least possible injury to private rights.

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RICHARDSON, J. This court has weighed the argument so well presented on the part of the appellants, and appreciate its force.

The practical power confided to the rail road company by their charter, is great ; and, from its very nature, such power might be abused or perverted, and landholders annoyed. Because the route of this great commercial way is, from necessity, left to the understanding, skill and discretion of the company ; and their authority might be practically enforced, with too little consideration for individual justice, or human feelings. But, for any such abuse of power, the laws supply ample remedy. An independent jury is a refreshing sight and sure refuge in every instance, and is secured by the charter ; and for continued abuse, or misuse, any charter may be repealed. But when the legislature have confided express power, it is not for this court to anticipate abuses and offer to restrain them, when our judicial province might be hereafter required in their supervision and correction. All powers, great and small, may be made oppressive. Yet, still, our necessities require them to exist in some tribunal.

If the rail road route had been given for a common highway, and surveyors named to locate its track through the entire State, and contractors hired to construct such road, with the emolument of toll gates, provided for compensation, the objections offered would be of similar character to those offered in the argument for the present defendants. There would be no difference in principle or degree.

The true substantial difficulty felt by the court, is in coming to the conclusion that the rail road is to be put on the footing and character of a highway, and is erected, not for private, but for such general purposes, as to render it an institution for such public purposes. But, according to the view taken in the circuit decision, that the application of the eminent domain of government is, from its essential nature, very various ; and to be made according to the successive exigencies of the State, it may be rationally assumed, that rail roads, although of recent origin, have already become of incalculable public importance : That the enlarged ends and ob-

jects of this great rail road especially, is, for the transportation and intercourse, commercial and social, of several different States, whose interests are to be ever regarded, and the mutual confidence that belongs to such a work sacredly fulfilled. This characteristic is irreconcilable with the proper conception of a mere private way.

Again: Rail roads have been recognized as highways in other States, with whose adjudications upon great subjects of commerce and reciprocal advantage, a liberal comity ought to be observed throughout the States: and the same great objects steadily kept in view by all who value rail roads, a new moral cement of the American Union, as well as the useful vehicles of our vast and increasing internal commerce: and thus uniting in their natural operation pecuniary profit with moral fitness, and the politic establishment of so many independent States.

May not rail roads, then, be fairly considered, in character and objects, (and ours more especially,) as international, and therefore public highways.

With such sentiments, and for such purposes, we are bound to consider the great ends of our own rail road system, and to inquire, under *their* guidance, whether the eminent domain of government may not be fairly and rationally applied for its advancement, in the very way pointed out by the present charter of the Louisville, Cincinnati and Charleston Rail Road Company. In such an instance, we should especially require, that the charter shall be clearly unconstitutional, before we put it in the power of any one freeholder to arrest the progress of so great a work of usefulness and high considerations. It is not enough that the human mind may balance on the subject.

But take another point of view, which I cannot help thinking of lasting importance. Such a rail road as ours, should be held as a highway on account of its great objects: and for the same reasons, to be kept under public control. Is it not wise to hold such a company, as the guardians, or lessees, of a great highway, endowed with a public franchise: yet subject to the control which their purposes indicate as necessary and proper for such an establish-

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ment, and which the general right to use the road absolutely requires?

Such a road must be held as a part of the public domain, farmed out to individual men, for its practical administration and order alone—and if placed aloof from such control, it would inevitably become suspected of partiality, and odious to the people.

Since the argument before this court, our attention has been turned to the case of *Beekman v. The Saratoga and Schenectady Rail Road Company*. It is found in *Paige's Ch. Rep.*, 3 vol., 45, and is a learned decision of Chancellor Walworth, of New York. It will be satisfactory to the parties concerned in interest, to know, that the following points were ably discussed and decided in that case: 1. "Acts authorizing rail road companies to take private property, for the purposes of the road, upon paying full compensation, are constitutional." 2. "Rail roads are public improvements; and the legislature can appropriate private property for such improvements, or authorize a corporation thus to appropriate it, upon full compensation to the owner." 3. "The public have an interest in the use of the rail road—and the company are liable to respond in damages if they refuse to transport an individual, or his property, without reasonable excuse, upon being paid the proper rate of transportation." 4. "The legislature may regulate the use of the franchise, and limit the amount of tolls, unless they have deprived themselves of that power by the contract." 5. "It belongs to the legislature to decide, whether the public benefit is of sufficient importance to justify the exercise of the eminent domain in such cases." 6. "And the only restriction is, that private property cannot be taken without full compensation and in the mode prescribed."

Thus, then, the decision of this court concurs in every material respect, with those of other American judicatures, who have considered the great modern establishments of rail roads.—And, it may be seen, that the manner of reasoning in each court has been drawn from the same great principles inherent in, and consecrated by the American constitutions. And thus, too, we have increasing evidence of our homogeneous principles—of their moral influence

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and sure fruits, in the harmony of opinions—and the consequent union in action, which engender reciprocal regard and tend so much to confirm the success of so many independent States, united together by such principles.

The appeal is dismissed on all the grounds taken.

DUNKIN, JOHNSON, HARPER, Chancellors; O'NEALL, BUTLER, GANTT, EVANS, EARLE, Justices, concurred. JOHNSTON, Chancellor, gave no opinion.

Chappell, for the motion.

Blanding, contra.

THE STATE v. W. T. M'BRIDE.

A State Court has no jurisdiction over the offence of stealing a letter from the mail in violation of the act of Congress of 1825, regulating the post office department. (The case of *The State v. Wells*, 2 Hill, 687, *contra* overruled.)

By the constitution of the United States, as well as upon general principles of law, a criminal offence arising under, and created by, an act of Congress, is punishable *only* in the courts of the United States.

An act of Congress conferring jurisdiction in such a case upon the State Courts, is unconstitutional and void.

Before EARLE, J., at Union, Fall Term, 1837.

THE defendant was indicted for a misdemeanor, in stealing a letter from the mail, containing money, in violation of the act of Congress, regulating the post office department. The grand jury having found a true bill, the defendant pleaded not guilty, and was ready for trial. The counsel for the prosecution being also ready,

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the court looked into the indictment, and was of opinion that it had no jurisdiction. On the motion to proceed in the trial—

EARLE, J., said:—I had hoped that some other mode of deciding the question now presented, would have been afforded; and that I should have avoided the necessity of refusing to try this cause. As both parties are ready, and express their willingness to proceed, I am driven to the alternative of violating my conscience, and disregarding my obligations to the State, and to the constitution, or of seeming to disregard the decision of the late Court of Appeals, in the case of Wells—(2 Hill's Rep., 687.) In such a case I cannot hesitate. That decision affords, doubtless, ample justification for the learned counsel who advised this prosecution, and for the learned solicitor who has preferred this indictment. In my judicial station I think I have shown sufficient deference to the decisions of that court, on all questions of mere law, or questions arising out of the State constitution. This is a subject of higher moment; a construction of the constitution of the United States, in relation to the judicial power of the general government, and the power of Congress, in distributing the jurisdiction of offences; a question, whether the State courts shall be made to become a subordinate portion of the judicial power of the United States, and to exercise such parts of the inferior jurisdiction of the general government, as it is not convenient for their own judiciary to assume. On such a question, I do not regard the decision in Wells' case, as finally settling the rule of construction; or as absolutely binding on me, making it matter of *duty* to take cognizance of such cases, against the strong, deliberate and conscientious convictions of my own understanding and judgment. If the constitution of the United States, which I have sworn to support, has excluded the State courts from entertaining jurisdiction in cases like this, as I firmly believe, then Congress is incompetent to confer it, and to assume it would be an act of usurpation. I will not be guilty, in this place, of the disrespect of arraigning the decision in Wells' case. The grounds of my own judgment, on the circuit, as well as the final opinion of the court, are before the public. My confidence in the correctness of my own views,

has not been shaken. If I may say so, with perfect deference and respect, as I surely mean no offence, I think the final judgment will be found not only unsustained by, but opposed to the decisions of those courts, of several states, most entitled to consideration.

In coming to a correct conclusion on this subject, the acts of Congress, from the judiciary act of 1789, down to the last act regulating the post office department in 1832, are to be put out of view. They can confer no jurisdiction, where the constitution excludes it. That instrument alone is to be our guide. "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made under their authority. To all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as Congress may from time to time ordain and establish." The case under consideration, is one arising exclusively under a law of the United States. The act now prosecuted is an offence only against that law; the stealing is not indicted as a larceny at common law. It is a prosecution carried on under the authority of the general government, to enforce its own criminal laws, and to inflict a punishment imposed by them. It is one of a class of cases, to *all* of which the jurisdiction of the federal courts extends, as it is made to extend to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction. If it be urged that the words "shall extend to all cases," are not meant to be exclusive, it may well be replied, that if Congress can confer jurisdiction on the State courts, in the former class of cases, they may equally in the latter; and in process of time, even the inferior business of admiralty may be conferred upon us. When an act of Congress enables a State court to try a civil suit, where the United States is a party, it provides no more than might have been done, under the original and inherent structure of the State courts, having, necessarily, before the constitution, and independent of it, jurisdiction at common law of such cases. And without such provision, in an act of Congress,

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the United States, as a party plaintiff, would be permitted to sue, and to recover judgment in the State courts. Such was the case of Dodge, 14 John. Rep., 95, cited in Wells' case. Of all that class of cases, as I endeavored to show on a former occasion, the jurisdiction of the federal and State courts is concurrent. But it will be found, that in the several classes first enumerated, arising under the laws of the United States, prosecutions for criminal offences created by them, it has been held by the courts of the highest authority, that the jurisdiction of the federal courts is exclusive, and that an act of Congress can confer no jurisdiction on a State court.

(His honor here cited several cases, and proceeded.)

With this weight of respectable authority, in support of the construction, which I have given to the constitution, sustained too, as I believe, by the bar and the country, I hope I shall not be charged with an immodest boldness, or an overweening confidence, if I persist in refusing to exercise the jurisdiction thus attempted to be forced upon me, notwithstanding the case of Wells. If it be meant by that decision, that the act of Congress conferring jurisdiction, is obligatory on the State courts, that we are obliged to try these causes, then it is time that the legislature and the country should be aware of the additional obligations imposed, and the new duties required. It is time some provision should be made, regulating the course of practice, when we lay aside the office of a South-Carolina judge, and assume the functions of a member of the federal judiciary, and it would not be amiss to establish the order of precedence in the trial of causes. If the decision does not go so far; if it means only that the State courts, *may*, if they choose, take jurisdiction, then I am guilty of no disobedience, as I certainly mean no disrespect, in refusing to try this cause. As a matter of policy, I am opposed to this blending of jurisdictions. Whatever ingenious theories may be broached, in which the government of the United States is made a part of that of South-Carolina, and the government of South-Carolina is made part of that of the United States, to a plain understanding it would appear, that the departments of the two, and their various functions are en-

tirely separate and distinct, having concern with, and relation to, each its particular and separate class of subjects, interests, and duties. I consider it a wise policy, to prevent conflict, and preserve harmony, that each should be kept moving in its own orbit. The consideration of convenience to the citizen does not weigh a feather with me. It would doubtless be very convenient for every man who has business abroad, to be able to do it at home. But I sit here to administer the laws of South-Carolina; and in the discharge of my appropriate duties, find ample occupation for all my time, and ample employment for all my powers. I do not come here to enforce the criminal laws of the United States, whose government in that regard is a foreign government. I am not the agent of that government; I derive no authority from it, and am not amenable to it. There is no provision made by our laws, or rules of practice, regulating the trial of this class of cases. An indictment in the name, and by the authority of the State of South-Carolina, for an offence against an act of Congress, is a strange anomaly however ingeniously framed "against the act of the Congress of the United States, and against the peace and dignity of the State of South-Carolina;" it sounds oddly, and I apprehend is a rare instance of one government being called on to enforce the criminal laws of another. It is not against the peace and dignity of the State of South-Carolina, to incur a penalty under an act of Congress, which South-Carolina, as a State, had no agency in passing; nor can an indictment be framed here for such an offence, that would not palpably violate the first principles of criminal jurisprudence, as well as the first rules of criminal pleading. Who prosecutes here? Not the State of South-Carolina, but the United States. The punishment is the sanction imposed by that government, by whose authority it is inflicted; and the attempt is to make the State the subordinate instrument in punishing, without the power of remitting. The anomalies would be endless.

In conclusion I will take the liberty to repeat, that this is not a question of private right, depending upon the principles of the common law: on the construction of a will or a deed; on the application of an old rule of evidence, or the adoption of a new rule

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of pleading. When the case of Wells came up, the question was presented for the first time in this State. I have heard that it was not argued at the bar. If it should be found, that the decision there is unsustained by authority, or incompatible with a sound construction of the constitution, it will not be the first time that courts of the greatest ability have delivered such judgments. It is no uncommon case to find every court reviewing the decisions of their predecessors: and if such course is allowable in regard to decisions, on subjects of private right, acquiesced in for a series of years, surely it cannot be matter of censure or rebuke, that an effort should be made to reconsider a great question of constitutional construction, adjudicated but once, the decision of which (in my judgment) may have the effect of transforming the character of the State tribunals, and of throwing upon them a vast increase of responsibility and labor. I protest it is from no captious spirit of opposition, from no paltry ambition to array myself against the late court, that I adopt this course. On the circuit law court will devolve all the additional duties, which may arise under the former decision. I desire that such an adjudication shall be made, as will be satisfactory to the members of that court, such as will enlighten them in regard to their new duties, or will relieve them of their new burthens.

Whatever practice exists on this subject, should be uniform throughout the United States. If the courts in South-Carolina take cognizance of these causes, the courts of the other States should do so likewise. If the convenience of the citizens here is so much consulted, as to allow them to be tried in the State courts, the same indulgence should be extended to those of Virginia and New-York, Ohio and Kentucky. If it be the right of the citizen here, to be tried in this court, for an offence against the United States, and if it be the bounden duty of this court, as the judicial power of South-Carolina, to hear such causes, it is fit and proper that such solemn adjudication should be made, as will in future secure the enjoyment of the right here and elsewhere.

To accomplish these ends, if the parties interested have confidence in their views, to prosecute them further, I will take such order as will enable them to do so.

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His honor then directed the following orders to be entered :

The want of jurisdiction being apparent on the face of the indictment—

ORDERED, That the same be quashed.

ORDERED, also, for the same reason, that the cause be stricken from the docket, with leave to either party to move the Court of Errors to reverse the judgment of the court, and to reinstate the cause on the docket for trial here.

Accordingly in the Court of Errors, at the ensuing December sitting, a motion was made on behalf of the defendant, claiming the right to be tried in the circuit court of the State, rather than in the federal court, to reverse the judgment of the court below, and to reinstate the cause on the docket for trial.

It was doubted by some of the court, whether the cause should be heard on the motion of the defendant, as the decision in the court below was in his favor. A majority of the court were of opinion, that as the proceedings had been ordered to be transmitted to the attorney of the United States for the district of South-Carolina, the defendant, if the State court had lawful jurisdiction, was deprived of a benefit which he might claim, and that it was rather to be regarded as a case reserved by the circuit judge, for the opinion of the Court of Errors, on an important question, and that it was proper to consider and decide it.

The counsel were directed to proceed in the argument.

Several grounds were taken in the brief :

1. That the case of Wells was a conclusive authority, whatever may have been the opinion of the presiding judge.
2. That the court having permitted the bill of indictment to go to the grand jury, it was not competent afterwards to say there was no jurisdiction.
3. That the court had jurisdiction of the cause.

The main question argued at the bar, and the only one which seems to have been decided by the court, was the abstract question of jurisdiction. . If the court below could not lawfully take cognizance of the cause, it seemed immaterial how it was disposed of there. If, on conviction, the verdict must have been set aside,

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for want of jurisdiction, it would have been superfluous to send it back because the presiding judge ought to have tried it, under the authority of Wells' case.

The question was very fully and ably argued by Thompson and Hill, for the motion, and by Mr. Sol. Player, contra.

At that term the cause was postponed for consideration ; and was decided in fact, at May sitting, 1838 ; but Mr. Justice Earle being absent in the circuit court in Charleston, no opinion was delivered. At the sitting in December, 1838, the chancellors closed their business unusually early, and the Court of Errors, did not formally assemble.

At May term, 1839, Mr. Justice Earle delivered the final judgment of that court, as follows :

EARLE, J. If the final judgment of the court, on this important question, shall seem to have been delayed for an unusually long term of time, it may not be amiss to remark, that this has not resulted from any intrinsic difficulties in the question itself; nor from any protracted consideration on the part of the court, whose judgment has long been made up on the subject. The delay has proceeded from accidental causes.

The question is of more importance than difficulty. It is not a new question. It began very early after the formation of the government to attract attention, and to excite discussion ; and has continued occasionally, to occupy the different courts of the Union as cases arose, until the argument is exhausted. I cannot but express, what I may be excused for feeling, much satisfaction that the conclusions of my own understanding, and the result of my own investigations on a former occasion, when I was unaided by authority, had received the sanction of the ablest jurists of the country, and of some who are not surpassed any where.

The principal difficulty, at the late argument of the present case, seemed to arise from the decision in Wells' case, where the late Court of Appeals held, that the State courts were bound to take cognizance of criminal prosecutions, under the authority of acts of Congress : and this, it was supposed, ought to have been a binding authority on the conscience and judgment of the Circuit

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Court. I consider myself under the necessity of disavowing that principle. On the contrary, I hold the question of jurisdiction, and more especially in criminal matters, to be one for the decision of the judge who is called on to exercise it. I regard this as a fundamental principle ; and I conceive that no judge could, without a violation of conscience and duty, and greatly hazarding his own peace of mind, undertake to exercise criminal jurisdiction in matters of high import, when, according to his best, deliberate judgment, the whole matter is foreign to his court. Every judge must determine for himself the preliminary question of jurisdiction.

In refusing to try M'Bride, I decided according to my own sense of what was due to conscience and law : And in making a question for the review of the Court of Errors, formed in express reference to such questions, I performed what I considered a duty to the State ; and surely, a review of former decisions is not an event of such rare occurrence. Since the judicial body was placed upon its present footing, such a course has been several times pursued. In the case of Glasgow, the Law Court of Appeals gave express permission to counsel, to bring in question the cases of the State v. Sonnerkalb, and the State v. Taylor, with the view of overruling them, if unsound. During this term, in Bennett v. Sims, the Court of Errors reviewed Reeves v. Harris and Bailey v. Jennings, and that Court has now under consideration a case involving the question, purposely raised, whether an important decision of the late Court of Appeals shall stand.

The decision of M'Bride's case, then, involves the correctness of the judgment of the same Court, in the State v. Wells ; and the Court of Errors, whose judgment I have now the honor to pronounce, has come to the conclusion that the decision in Wells' case was erroneous in principle ; and that it is opposed to the current of sound authorities on the same point. And here perhaps it might be enough to refer to the views which I took occasion to present, on the circuit, in that case, as containing a concise statement of the grounds of our present judgment ; but it is desirable to show that the grounds there assumed, have the sanction of several of the highest courts of the union.

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The act of Congress under which the defendant was indicted, is the same upon which the case of Wells arose. The offence charged was that of opening the mail bag and purloining money therefrom, contained in a letter which he abstracted. The punishment is a heavy fine and a long imprisonment. And the first inquiry which one is prompted to make, is, by what authority is this called a prosecution at the suit of the State? The State v. M'Bride? The offence is against the Government of the United States, which enacted the law, which prescribes the penalty, which has ordered the prosecution, and which, after conviction, would claim the right to dispose of the culprit, and remit or execute the sentence at its option. All the anomalies of the proceeding, some of which were enumerated on a former occasion, at once present themselves to the mind of a jurist. The State court is organized under a different government, from which its judge and other officers, receive their appointments. There is no provision in any of their commissions, nor in any act of South Carolina, authorising them to take cognizance of criminal offences against another government. And if the judge should consent to hear the cause, I know no authority by which he could compel the jury to try it, or the sheriff to carry the sentence into execution. I make bold to say, in such case, if the jury should refuse to try the cause, or the sheriff to aid in carrying the sentence into execution, the court dare not lay a finger on either, by way of contempt.

The whole argument on the other side, is founded on a misconstruction of the article in the constitution on the judicial power, and I think, in a misconception of the true structure of the government. "The judicial power shall be vested in one Supreme Court and in such Inferior Courts, as the congress may, from time to time, ordain and establish." "Congress shall have power to constitute tribunals, inferior to the Supreme Court." And it has been argued, first in the Federalist, "that to confer upon the existing courts in the several States, the power of determining causes, would perhaps be as much to constitute inferior tribunals, as to create new courts with like powers." To this proposition I must enter my decided dissent; and here I will remark, that able as were the

authors of the work referred to, their opinions cannot be received as authority in judicial investigations. The purpose of that work was to reconcile a divided community to the adoption of the constitution; and in accomplishing this object, it can hardly be denied that they sometimes exaggerated its advantages, and spread over the objectionable features the gloss of plausible construction. / On the contrary, I maintain that the Constitution of the United States has, in express terms, confided to the judicial power of the Union, the jurisdiction and duties arising under the act in question; and that it is inconsistent with the nature and principles of our government, for the United States to impose judicial duties upon the State Courts. / To prove that the first branch of the proposition is true, it is only necessary to advert to the enumeration of the subjects of the judicial power. "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, and other ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and a citizen of another State; between citizens of the same State, claiming land under grants from different States; and between a State and the citizens thereof, and foreign States, citizens or subjects." In remarking on this article formerly, I laid down the proposition, that the judicial power of a State, in its original constitution, is co-extensive with the legislative, and extends to all subjects of controversy which can arise under the laws. Without any specific enumeration, therefore, of the subjects of the judicial power in the constitution, the courts of the United States, from the very nature of their office and duty, would have taken cognizance of all those cases which are embraced in the three first clauses; because they are cases arising, or which would arise, under the limited legislation of a government of limited powers. And of all those classes of cases, their jurisdiction is exclusive. In all the other enumerated classes, their jurisdiction is concurrent with the common law courts of the several States. It was competent for

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congress in its legislative capacity to regulate the post office department, and by penal enactments to protect the mail from pillage. 'Offences thus created against the United States, are cases arising under the laws of the United States, strictly within the meaning of the clause already cited, to all of which the jurisdiction of the federal courts extends; and which, therefore, cannot be delegated by an act of congress to the courts of the several States.// I will not here repeat, what I took occasion formerly to urge, as an additional argument why congress cannot confer any jurisdiction on the State courts, that the judges to be appointed, and to whom the judicial power is to be entrusted, are to hold their offices during good behaviour, and to receive a compensation from the government. How then can congress constitute inferior tribunals, by distributing its judicial power among twenty-six judiciaries of the States, appointed by the States, paid by the States, and holding their office by every variety of tenure? If congress could confer any portion of its jurisdiction, it might confer the whole; and the absurdity might arise of a State judge continuing to exercise the authority of a judge of the United States, after his term of service has expired; or the existence of the federal authority to try certain classes of cases, would depend on the pleasure of the States.

I have said it is inconsistent with the nature and principles of our government, for the United States to impose such duties upon the State court. This arises from its peculiar structure. They are separate and distinct governments, independent of, and foreign to each other, in respect of their several objects, powers and operations—each is complete in itself; and although the action of the State governments is necessary to the formation of the federal government in some of its departments, yet it is not necessary to its ordinary operation, and the action of the federal government is in no wise necessary to the constitution, or operation of the State governments. They are said to be parts of one whole, an expression often used by persons who entertain opinions widely different, both in regard to their structure and operation; while some maintain that the whole is superior to all the parts, others contend that each part is superior to the entire whole. Its structure, and the

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principles which form its basis, demonstrate and establish that the government of the union cannot interfere with the powers reserved to the States, or exercise authority over them in any way not expressly authorised by the constitution.

To allow congress to confer jurisdiction, and to constitute State courts inferior tribunals, under the provisions of the constitution, would at once transform State judges into federal officers, and make them a portion of the federal judiciary. Some of the consequences of such a proceeding were formerly pointed out; but independently of the objection growing out of that view, there is another which lies deeper and involves a more important principle, which is at the bottom of all judicial administration; it is that which I have before glanced at, that the judicial power, in its extent, depends on the legislative. It is a settled principle of jurisprudence, recognized by all sound commentators, and is well expressed by Mr. Rawle in his treatise on the constitution: "The judicial power must be general or limited, according to the scope and objects of the government; in a word, it must be fully and exactly commensurate with that of the legislature. It cannot by any terms of language be made to extend beyond the legislative power, for such excess would be inconsistent with its nature." The clear, well defined separation between the legislative function of the general government and that of the States, at once presents the principle in strong relief. The classes of subjects to which the legislation of congress may extend, are enumerated in the constitution. The jurisdiction of the federal courts extends to all cases arising under laws passed there, and to some others expressly mentioned. The residue of the legislative power, embracing a vast variety of subjects and interests, belongs to the States: these cannot be specified, and have not been attempted to be specified; and the judicial power of the States extends to all of them. It has not been attempted to define by an enumeration of subjects, the extent, either of the legislative or judicial power of the States; they are commensurate with each other, and extend to all subjects not confided by the constitution to congress and the federal judiciary. Can the State legislature undertake by law to regulate the post office, provide for the security of the mail, or pass a penal statute, such as

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that which gave rise to this prosecution? No one will pretend this; and it follows indisputably that the judicial power of the States can take no cognizance of such an offence. To congress alone belongs the power to legislate on the subject, and to the courts of the United States belongs the jurisdiction of the offences created.

It is also a settled principle of jurisprudence, sanctioned by the practice of all countries, especially of England and of these States, that the courts of one country will not enforce the penal laws of another, much less will they undertake to prosecute and punish crimes and public offences against another. They are offences only against the authority of that government. As is said by Mr. Justice Platt, of New-York, in the case of the United States and Lathrop, "that a State court can in no case hold jurisdiction to punish criminaliter for an offence against the United States, is clear, for this plain reason, that every criminal prosecution must charge the offence to have been committed against the State or sovereign, whose courts sit in judgment on the offender. In the administration of criminal justice, every sovereign acts as judge in his own case as the offended party; and a State court cannot act as an organ of judicial power, representing the United States, because in its appointment, tenure and accountability, it is independent of the federal government." Mr. Justice Story, in *Houston and Moore*, 5 Wh. 69, holds the same language: "It is a general principle too, in the policy, if not the customary law of nations, that no nation is bound to enforce the penal laws of another, within its own dominions. The authority naturally belongs, and is confided to the tribunals of the nation creating the offence. In a government formed like ours, where there is a division of sovereignty, and where of course there is danger of collision, from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals." The same principle is asserted in that case, by Mr. Justice Washington, who delivered the judgment of the court, although there was a difference of opinion as to the application of the principle. "For I hold

5 Wh. 69—

it to be perfectly clear, that congress cannot confer jurisdiction upon any courts, but such as exist under the constitution and laws of the United States—although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts.” But the most explicit recognition of the principle, by one of the ablest courts that ever sat in this country, was in the case of *Martin v. Hunter’s lessee*, 1 Wheat. 304. That case, during its progress through the various courts where it was entertained, was probably more thoroughly discussed, and more maturely considered, than any cause ever heard in the American courts. The whole structure of the federal government and especially of the judicial department, underwent a searching scrutiny—and the relative powers and jurisdiction of the courts of the United States, and of the several States, were attempted to be ascertained and illustrated, with the most accurate precision. And, although I cannot yield my assent to some of the propositions advanced, in relation to the power of congress to render the jurisdiction of the federal courts exclusive, in all the classes of cases of which they may take jurisdiction at all, yet I fully concur in the positions taken, in regard to the power of congress to confer jurisdiction upon the State courts, in those cases which are exclusively confided to the federal courts by the constitution. Says Mr. Justice Story, “no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to the state tribunals; the admiralty and maritime jurisdiction are of the same exclusive cognizance; and it can only be in those cases, where, previous to the constitution, State tribunals possessed jurisdiction, independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.” To this direct authority on the point, I will add the weight of another able jurist and commentator. Ch. Kent, 2 Com. holds the following language: “The doctrine seems to be admitted, that congress cannot compel a State court to entertain jurisdiction in any case. It only permits State courts which are competent for the purpose, and have an inherent jurisdiction adequate, to entertain suits in the given cases; and they do not become infe-

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rior courts in the sense of the constitution, because they are not ordained by congress. The State courts are left to infer their own duty from their own State authority and organization. Their jurisdiction of federal causes is, however, confined to civil actions, or to enforce penal statutes; and they cannot hold criminal jurisdiction over offences exclusively existing as such against the United States. Every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment against the offender, and whose executive may pardon him." In regard, therefore, to criminal prosecutions for public offences committed against the United States, punishable by indictment, there seems to be no question that the State courts cannot take cognizance of them.

In regard to actions for the recovery of pecuniary penalties, or as Ch. Kent expresses it, "to enforce penal statutes," there seems to have been some difference of opinion and practice. While in New-Jersey and in Tennessee such suits have been entertained, and recoveries had, the courts of Virginia, Ohio, New-York and Kentucky have refused to entertain suits, in behalf of the United States, for the recovery of such penalties, considering them as in the nature of criminal prosecutions, rather than of civil actions. In the case of *Jackson v. Rowe*, decided in 1815, the General Court of Virginia, consisting of eight judges, unanimously refused to take cognizance of a suit for a pecuniary penalty imposed by an act of Congress; and held, that the act conferring jurisdiction on the State court, was unconstitutional and void; and that to assume jurisdiction of such cases would be to exercise a portion of the judicial power of the United States. As early as 1813, the General Court had also decided unanimously, that a prosecution for stealing from the mail, in violation of an act of Congress, could not be maintained in the State courts. *Com. v. Feely*, Virg. Ca. In 1816, the case of the *United States v. Campbell*, (Am. Reg.) came on before a State court in Ohio. It was an information by the collector of the revenue, to recover a penalty for distilling without license; and on a plea to the jurisdiction, Tappan, Justice, held that the United States could not prosecute for offences against

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these laws in the State courts ; that the State of Ohio was a sovereign and independent State, not controllable by any earthly power, either in the making or the administration of laws, except only in such particulars as it had delegated a portion of that sovereignty to the United States, by the constitution, and had limited itself by that instrument ; that Congress could give no jurisdiction to the State courts, and require no judicial duties from them ; that one sovereign cannot make use of the municipal courts of another to enforce its penal laws ; and that as to its judicial power and its penal laws, the government of the United States was as much an independent and separate government as Great Britain or France, or either of the United States. In the case of the United States v. Lathrop, in 1819, the Supreme Court of New-York, came to the like conclusion, in regard to the same sort of action. Spencer, Ch. J., delivering the opinion of the court, said, " the jurisdiction of the State courts is excluded in cases of crimes and offences cognizable under the authority of the United States, and in cases of suits for penalties and forfeitures, incurred under the laws of the United States ;" and Mr. Justice Platt dissented only on the ground, that it was to recover money, and not a criminal prosecution. In the case of Haney v. Sharpe, the Supreme Court of Kentucky, in 1833, came to the same resolution in regard to the same kind of action. The weight therefore of authority is decidedly against the proposition, that the State courts can take cognizance of suits, brought by the United States, merely for the recovery of pecuniary penalties. How much stronger and more conclusive are the reasons why they cannot take jurisdiction of crimes and offences, prosecuted at the instance of the United States, by indictment, need not be argued to minds accustomed to judicial investigations.

I have, in another place, attempted to exhibit the true ground of the concurrent jurisdiction of the federal and State courts, over certain classes of cases, enumerated in the constitution, and of which the State courts, by virtue of their original and inherent powers, had jurisdiction, independently of the constitution, and anterior to it. The ground, on which this was there placed, is admitted both by

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Mr. Justice Story, and Ch. Kent. But they both maintain the proposition, that even of these, Congress may, at its election, make the jurisdiction of the federal courts exclusive. To this I cannot yield my assent. It is alike incompetent in Congress to take away the jurisdiction of the State courts, where they originally had it, and to confer it where they had it not, and where it would be inconsistent with the constitution, and incompatible with first principles that they should exercise it. The position assumed by the writer of the *Federalist*, "that the State courts, in every case, in which they are not expressly excluded by future acts of the national legislature, will of course, take cognizance of the causes to which those acts may give birth," is utterly untenable. The State courts, as tribunals of common law jurisdiction and powers, might at any time have taken cognizance, and do so continually, of many causes, which might also be carried into the United States courts. But this does not depend on the will of Congress, and the jurisdiction cannot be abridged. The State courts likewise take cognizance of the laws of the United States, when the right to property, or the construction of contracts depends on them; just as they would of the laws of any foreign country. But this is only in civil cases, where on a principle of the common law, the particular enactment becomes, incidentally, part of the cause.

The argument, on the other side, is supposed to be aided by the provisions of the act of 1789, giving exclusive jurisdiction to the Circuit Courts, of all crimes and offences, cognizable under the authority of the United States, "except where the laws of the United States shall otherwise provide," and it is said that this exception accounts for the proviso in the act of 1807, concerning forgery of the notes of the U. S. Bank, and for the provisions of the several acts, conferring jurisdiction on the State courts, over certain inferior offences against the United States. The proviso in the act of 1807, in regard to the notes of the bank is, "that nothing in that act contained, shall be construed, to deprive the courts of the individual States, of jurisdiction under the laws of the several States, over offences made punishable by that act." But all the reasoning on this subject, whether by Mr. Justice Washington,

in *Houston v. Moore*, Mr. Justice Story, in *Martin & Hunter*, or Chancellor Kent, in his *Commentaries*, I think is unsatisfactory. It has even been supposed, that the saving in the act of 1807 alone enables a State court to punish the altering of a forged bank note of the U. S. Bank, although it be a distinct offence, by the law of the State. Nothing shows more conclusively the inaccuracy of the views on this head, than that this is regarded and treated as a case of concurrent jurisdiction over the same offence, authorised by the proviso of 1807. It is not a case of concurrent jurisdiction, for it is not the same offence. The forging or altering is a misdemeanor by the act of Congress. The same act of forging or altering is a felony by the law of this State. And the authority to punish in the State court, under the State law, is wholly independent of the United States, and is derived from the sovereign power of the State. It existed before the constitution, or the proviso, and as it is not derived from either, so it cannot be taken away. The offences are not the same, and it is not a case of concurrent jurisdiction, not only because the laws are different, but the offences are created by different governments, and the courts derive their authority from different sources. How far a conviction or acquittal in one court, would be a bar to a prosecution in the other, is another question, of great delicacy, not necessary to be here considered, and depending on principles of international law, altogether foreign to the provisions of the constitution, or of the acts of Congress. This is a very different case from that of a remedy for a private injury, in a civil action, within those classes of cases, which may be taken either into the federal or State courts. These are in their nature transitory, depending on contract or tort, arising out of the common law, which is the same in both courts. Of these cases the jurisdiction is concurrent and must remain so.

I have been the more emboldened to present and urge these views, because they have met the approbation of the ablest courts in the other States of the Union, and because the result produces an uniformity, which is of the utmost importance, on a question of great interest. The effect will be to preserve unimpaired those

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constitutional barriers between the departments of the federal and of the State governments, which are essential to their harmonious operation. Let each be restrained, strictly, within the limits which the constitution has prescribed, and be withheld from encroaching on the jurisdiction of the other, and both will go forward affording adequate relief, within their proper spheres; and extending and perpetuating the blessings of order and good government, to the whole people and through all time.

It is the opinion of this court, that the act of Congress, conferring jurisdiction of this offence on the State courts, is unconstitutional and void; that the court below did not err in refusing to take cognizance thereof, and that the judgment and orders of the Circuit court be affirmed.

JOHNSTON, Chancellor; GANTT, RICHARDSON and EVANS, Justices, concurred.

BUTLER, J. I have felt great difficulty as to my course in this case. Upon one ground I differ entirely with my brother Earle, whose decision on the circuit has been sustained by the very able opinion delivered by himself, as the judgment of the Court of Errors. As a circuit judge, I think he was bound to have taken jurisdiction of the case. A circuit judge is an inferior magistrate to the Supreme Court, of the last resort. When he forms a part of the Supreme Court, he has an equal right to review and reverse a decision that has been made by it. When he is on the circuit he occupies a subordinate position, and has no right to set up his judgment in opposition to the law, as it has been interpreted by a paramount and controlling jurisdiction. It is my every day's practice to surrender my judgment to a decision of the Court of Appeals, when it adjudges the point expressly involved. A judge is a magistrate whose peculiar duty it is to assert and maintain the dominion of the laws; and he should be distinguished in setting an example of obedience to them. His duty on circuit is, to preside over the courts of *justice*, and to see that the law is administered faithfully as he finds it interpreted by the superior courts of

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law. When the judges meet as a Court of Appeals, they become a court of *law*, whose decisions should not be reversed but by an authority equal to their own. If a circuit judge may disregard and reverse a decision thus made, what is to prevent a justice of the peace, or any other magistrate, from putting his at defiance. He might always take refuge in his own conscience and the convictions of his own judgment. The judiciary depends alone on public opinion to sustain it, and when inferior magistrates and parties can appeal to it in opposition to the judicial decisions of the country, law loses its just dominion, and becomes the creature of popular caprice. The moment that one can disregard it with impunity, communities may, and will, put it at open defiance. Upon the other and the main question of the case, the opinion of the court has my entire approbation and concurrence; and for the satisfactory reasons so well assigned in it.

O'NEALL, J. I dissent from the judgment in this case, on two grounds: 1st. The court had jurisdiction in this case. My reasons are given in the case of the State v. Wells; and I have not now time to add any thing to them which ought to be done. 2d. The circuit judge had no right to strike the case from the docket. Until the case of the State v. Wells was reviewed and reversed, it was obligatory on any judge. The decision of the Supreme Court, whether of *three* or *ten* judges, ought to be respected. According to the precedent set in this case, I might, believing as I do, that this case comes to a wrong conclusion on a point of constitutional law, try any and every case of the kind, which might be presented to me on the circuit.

JOHNSON, Chancellor, gave no opinion.

HARPER, Chancellor, absent.

DUNKIN, Chancellor, gave no opinion, having been elected since the argument.

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WILLIAM BENNETT v. GEORGE SIMS.

A verbal *condition* made on the transfer by delivery, of a personal chattel, under a contract of sale, *that the right of property* shall remain in the vendor or person transferring possession until the price agreed on be paid and not pass *absolutely* to the purchaser until then, is consistent with the rules of law, and will enable the vendor to maintain trover against an officer who sells the chattel, under process, as the property of the vendee in possession, at the suit of one who was a subsisting creditor of the vendee at the time of the transfer. (O'NEALL and BUTLER, J., dissenting.)

The cases of Dupree v. Harrington, Harp. R. 391; Reeves v. Harris, and Bailey v. Jennings, 1 Bail. R. 563; to the same point, commented on and their authority recognised by the court. (O'NEALL and BUTLER, J., dissenting.)

Before EARLE, J., at Lancaster, Fall Term, 1837.

This was an action of trover by way of summary process for a mare. The plaintiff sold a mare to one Hugh Massey, for \$45, in the fall of 1835, and delivered her to Massey, calling on two by-standers to bear witness that the mare was to remain his property until she was paid for. The delivery was made on that condition, with the assent of Massey, who said he had bought her on those terms. Massey had her in possession until she was sold, and since left the country. The defendant sold her as the property of Massey, under execution; plaintiff forbidding the sale, and claiming the mare. His honor, the presiding judge, decreed for the plaintiff for the value of the mare.

The defendant appealed, and now moved for a nonsuit or new trial on the following grounds:

1. Because, by the sale to Massey, plaintiff having parted both with the possession and right of possession, trover will not lie.

2. Because, even regarding the contract with Massey to be in the nature of a mortgage, still the possession and right of possession remained in Massey, till condition broken, consequently trover will not lie.

3. Because the seizure and sale by the constable being by competent and legal authority, and not tortious, a demand and refusal ought to have been proven.

4. Because the plaintiff, by permitting Massey to take possession of the mare, stands towards him in the position of a creditor, consequently any agreement by which the mare should be made responsible for his debt, would be fraudulent and void as to other creditors.

5. Because the verdict is contrary to law and evidence.

Wright, for the motion.

CURIA, per **EARLE, J.** The main question arising here, is, whether a verbal stipulation, made on the transfer, by delivery, of a personal chattel, under a contract of sale, that the right of property shall remain in the vendor, or person transferring possession, until the price agreed on be paid, and then pass absolutely to the purchaser, is consistent with the rules of law; and will enable the vendor to maintain trover, against an officer who sells the chattel, under process, as the property of the person in possession. The plaintiff claims under such a reservation of title; and on the trial below, obtained a verdict, under the instructions of the court, upon the authority of *Reeves v. Harris*, and *Bailey v. Jennings*, 1 Bail. 563. Those cases being frequently questioned at the bar, and their soundness being denied by some members of the court, it has been deemed advisable to take the sense of all the judges. The result of their judgment I am now to pronounce. And here, perhaps, it would be quite enough, to refer to the opinion of the court in the cases cited by Mr. Justice Colcock, as furnishing an ample vindication of the principle involved, as well as of its application to those cases. But in the discussion here, some views have been taken, and our researches have enabled us to present some additional authorities, which will probably illustrate the principle, and strengthen the authority of those cases. The great danger which seems to be apprehended, from the rule of property recognised in these cases is, that the persons in possession, under

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such conditional transfer, will acquire a false credit, on the faith of it ; and if the possession is not held to be evidence of title, creditors will be defrauded. But it is a remarkable coincidence in all these cases, beginning with *Dupree v. Harrington* Harp. R., 391, down to the case under consideration, that neither the rights of subsequent creditors, nor the rights of subsequent purchasers without notice, are at all involved. In the first case, Kendrick, the defendant's intestate, was a subsequent purchaser with notice of the title ; and in all the other cases, the property was sold under process, for debts subsisting at the time of the transfer. In the case of *Dupree v. Harrington* the reservation was in writing ; and that is supposed to make a great difference. I confess myself unable to perceive on what ground. It is at last, but an agreement between the parties, proved in one case by writing, and in the other by witnesses, that the sale is not absolute, that the title does not pass by the delivery, and is not to vest in the purchaser, until he performs the condition of payment. A sale is a transfer of chattels from one person to another, for a valuable consideration ; and if it is competent for parties to perfect a sale, by actual payment of the price, on one hand, and absolute delivery of the chattel on the other ; surely it is equally competent for them to modify the terms of the sale, to suit their own views and interests ; and if the purchaser obtains delivery by giving a promise, or security to pay, at a future day, the vendor may strengthen the security, and qualify the delivery, by annexing as a condition, that the title does not pass by it, and shall not vest until payment of the price. If the purchaser accepts the delivery on such terms, who shall gainsay it ? Who has a right to say he shall not be bound by the terms of his agreement ? The ready answer that creditors may be defrauded ; that the purchaser may acquire a false credit and therefore a verbal reservation of title is void, seems very unsatisfactory. I think it cannot be doubted, that such a reservation, whether by writing, or by parol, is binding on the parties, and therefore is not void, *Rann v. Hughes*, 7 T. R., 346, *n.* All contracts concerning personal chattels are as valid by parol as in writing ; and in fact there is no such division of contracts, except as to those which are re-

quired to be in writing by statute. Such a verbal stipulation, as we are considering, may be good between the parties, and void as to future creditors and subsequent purchasers. As neither are now concerned, the only question is, whether it be void, as to subsisting creditors. I cannot grasp the principle, on which they may claim to avoid it, whether written or verbal. There is no statute requiring such a paper to be recorded; and so far as concerns actual notice, a verbal reservation on delivery, in presence of witnesses, is far more effectual than a written acknowledgment, without witness, and put in the pocket of the seller. But so far as relates to subsisting creditors, it is not put on the ground of notice. It is said possession is evidence of title; the seller puts the purchaser in possession, and creditors, and others, have a right to treat the property as his, whatever may be the verbal stipulation between themselves. But possession is only *prima facie* evidence of title, as to third persons and wrong doers; it is a principle intended to protect the person in possession, and not to enable him to defraud the owner, or others to do it through his means. I can understand that the right of property draws to it the possession; but it seems a novelty to say, that possession draws to it the right of property. The subsisting creditors have neither a legal, nor meritorious claim to subject such property to their debts. They have not credited him on the faith of it. The chattels, merchandise or money, which they have furnished him, and for which they have given him credit, have not been exchanged, or paid for it. It is a new acquisition, which they have not aided him to make, and of which, as his title is yet imperfect, they have no legal right to deprive him. Such a reservation is sometimes called a verbal mortgage; but it has no likeness of a mortgage. No doubt if the sale were at first absolute, and the delivery without qualification, a subsequent verbal agreement, that the right of property should revest in the seller, on non-payment, or the non-performance of any other condition, would be void, the purchaser remaining in possession. In that case a written instrument, of some kind, would be necessary to reconvey the title; the delivery of which would be equivalent to a re-delivery of the property; and then it would be a

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common mortgage. The predicate of all the reasoning here is, that there is no actual and absolute sale ; but only a species of bailment, for use, to become property, on the payment of the purchase money, at a day certain. So far as regards the effect of this proceeding, upon present or future creditors, there is no difference between it, and an unrecorded mortgage ; or a loan from year to year, or a hiring, where the contract is not in writing. In all these instances, the possession is in one, and the title in another. In all of them, men may give credit to the former, on the faith of the property in his hands ; or representing it as his own, he may make sale of it to a stranger. Why may not the property be thus wrested from the lawful owners, in all these instances, on the same supposed rule that possession is evidence of title, so much misapplied in the case we are considering ? As to subsisting creditors, I have endeavored to show, that they cannot establish their claim on the ground of fraud ; and independently of that ground, that the reservation, whether verbal or written, if good between the parties, is good as to all others. That subsequent creditors, and purchasers without notice, may be liable to be defrauded is not questioned ; and so are they liable to suffer from innumerable transactions concerning property, that are perfectly fair and legal in their inception. It is impossible for the legislature, or for courts of justice, to guard men against all fraud, in a commercial age and country, where cupidity is stimulated by a thousand motives, and is rewarded, in proportion to the zeal of its pursuits, and the variety of its enterprises. It is enough that we can generally relieve honest dealers, against actual fraud, after it has been practised upon them, by a liberal application of the principles of the common law. It is upon these principles, that the plaintiff rests his claim, in this case, to be protected in his right of property. I think the view I have taken of the law of sales, will be found supported by the current of authorities, as well as sustained by sound principle. A voluntary and absolute delivery under contract of sale vests the title ; “ but if,” says Ch. Kent, “ the delivery be accompanied with a declaration, on the part of the seller, that he should not consider the goods as sold, until security be given, the sale is conditional,

and the property does not pass by delivery, as between the parties," and cites the case of *Hussey v. Thornton*, 4 Mass. Rep. 405, and *Marston v. Baldwin*, 17 Mass. Rep. 606. Pursuing the same subject, he adds, "where there is a condition precedent, attached to a contract of sale, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it; and the right continues in the vendor, even against the creditors of the vendee," and cites *Barrett v. Pritchard*, 2 Pick. 512. And to the same point will be found the case of *Ward v. Shaw*, 7 Wend. 404. In this case the result may be thus stated:—In regard to the sale of chattels, where any thing remains to be done, before the sale can be considered complete, whether by the vendor, or vendee, as between the parties themselves, the right of property does not pass, although the chattel is placed in the hands of the vendee. In all these cases the contest was between the original owner and vendor, and the creditors of the vendee in possession, enforcing their demands by process; and in all the cases, except *Barrett v. Pritchard*, the condition of the delivery was verbal. The case of *Marston v. Baldwin* is very similar to this. It was an action for rum, and other goods, sold by the plaintiff to one Holt, and delivered to him, but on the condition that the property was not to vest in Holt, until he should pay 150 dollars in part payment. Holt paid 75 dollars only, and the defendant, as deputy sheriff, attached the goods as Holt's, for a previous debt of one Babcock. And it was held that the plaintiff might maintain the action, without rescinding the contract, or refunding the 75 dollars. These cases were decided in courts of the highest authority in the U. States. The principles have the sanction of C. J. Parsons, and Chancellor Kent. They cannot be regarded, therefore, as innovations on the common law. In 2 Barn. & Ald. 330, *n.*, will be found the case of *Bishop v. Shillito*—trover for iron. The iron was delivered under a contract that certain bills outstanding, against the plaintiff, should be taken up. After a part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the further delivery, and brought trover for what he had delivered. The court held, that this was only a conditional delivery; and the

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condition being broken, the plaintiff might bring trover. If there be no difference in principle, between a condition in writing, and a verbal one, the case of *Dupree v. Harrington* is a direct authority. I have tortured my faculties to conceive a ground of difference, except only as to the facility and mode of proof. In point of openness, fairness, and notice to the public, a conditional delivery before witnesses, is least objectionable.

In regard to subsequent creditors, it will be time to provide for them, when they complain. It will then, as in other cases of like kind, be a question whether in fact they are defrauded, and will depend on the circumstances, going to prove fairness or the reverse. If a very extended credit be given, without good reason, or a credit disproportioned to the value of the property, especially if it consist of merchandise, or other articles usually kept for sale, or of things to be consumed in the use; or if after the condition broken, the vendor permit the vendee to remain, for a long time, in possession without enforcing his claim, or retaking possession, these would be badges of unfairness. So it is said by Ch. Harper, in *Gist v. Presley*, 2 Hill, C. C. 328, in case of a mortgage, after condition broken, "a great degree of neglect in leaving the property in the mortgagor's possession, might be a badge of fraud." Whenever the vendor's right of property shall come in conflict with the claims of those, who become creditors after the transfer of possession, then the court will endeavor so to modify the rule, or restrict its operation, as to protect the rights of bona fide creditors, who may have trusted the supposed purchaser, on the faith of the property in his possession.

The form of the action is not discussed in the two cases referred to; and a technical objection has been raised here, that the debtor being in possession by delivery, and entitled to retain it until the time of payment, the plaintiff has not that right of immediate possession necessary to maintain trover. In this case the time of payment was passed. The right of property being in the plaintiff, draws to it the constructive possession. The possession of the vendee, who after condition broken, is tenant at will, is the possession of the plaintiff, on which I think he may maintain trover. The

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sale by the defendant was a conversion. *Reeves v. Harris*, and *Bailey v. Jennings*, were both actions of trover, and this question could hardly have been overlooked. A majority of the court are of opinion that there is no sufficient reason to overturn the cases of *Reeves v. Harris*, and *Bailey v. Jennings*; and that the plaintiff, on principle and authority, is entitled to retain his verdict.

The motion for a new trial is refused.

DAVID JOHNSON, J. JOHNSTON, DUNKIN, Chancellors; RICHARDSON and EVANS, Justices, concurred.

O'NEALL, J., dissenting. I think it is clear and undeniable law, that to maintain trover for a chattel, there must be a right of possession and property, or a right of possession alone. This principle has the sanction of *Bell v. Monahan*, decided December term, 1837, (Dud. Rep. 38.)

In the case before us, the plaintiff sold the mare to Massey, in whose possession she was found by the defendant. The verbal condition annexed to the sale was, that she was to remain the property of the plaintiff until paid for. Admit for the present that by this contract the property remained in the plaintiff, still another had the possession, and had the right to retain it, until there was a demand of payment of the debt and a failure to pay. No such evidence was given, and hence the defendant, a constable, might well sell Massey's interest, and the plaintiff against him had no cause of action. But independent of this view, I am not satisfied with the decision in the cases of *Reeves v. Harris*, and *Bailey v. Jennings*, 1 Bail. 583, on which the decision below in this case is based. I never have thought that a verbal condition could be annexed to the sale of a chattel, which would bind any except the parties. This is as far as the case of *Harrington v. Dupree* goes. The cases of *Reeves v. Harris*, and *Bailey v. Jennings* proceed upon the notion, that the vendor, by the condition agreed upon between him and the vendee, retains the right of property. But this is not in my judgment a legal view. The sale is complete when possession is delivered. Conditions accompanying it are merely a

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contract between the vendor and vendee. To give any other construction would allow a verbal mortgage to be set up, which is certainly carrying the law a great way beyond any principle which I have understood to be recognised in equity. A chattel may be pledged ; but that is done by delivery of possession in fact as well as by word of mouth. The decision in *Reeves v. Harris*, and *Bailey v. Jennings*, is certainly at war with the whole current of decisions before those cases were decided, and has not been confirmed by any subsequent decision, or by any settled practice following their rule. Under these circumstances, and the feeling that the principle adjudged by those cases, is an unsafe one, I am notwithstanding my unfeigned respect for the talents, learning and virtues of the judges who decided those cases, constrained to say, that I think that decision should be overruled, and declared not to be law.

BUTLER, J. concurred with Mr. Justice O'NEALL.

[The succeeding cases should properly have appeared with the other cases decided at Columbia, May Term, commencing ante page 257, and ending at page 381, *when* the Reporter finished, as he supposed, *all the cases* decided at that term, which were to be reported. He then commenced the "Cases in the Court of Errors," which he intended, according to the arrangement he had adopted, should finish the volume. Within a few days past, and while the cases in the Court of Errors were being printed, he received from Columbia, several cases decided at the May term, which were directed to be reported. The delay in receiving these cases has had the effect, as will be perceived, of dividing the cases of May term into two parts, and also interfering with the plan adopted by the reporter. This circumstance explains the apparent want of order in the cases of that term, and only needs to be mentioned, to prevent any misconception or mistake which might otherwise arise on that account.

September, 1839.]

ADDITIONAL
 CASES AT LAW,
 ARGUED AND DETERMINED IN
 THE COURT OF APPEALS
 OF
 SOUTH-CAROLINA,
 MAY, 1839.

See notice page 430, and as to the Judges present, see ante p. 257.

THE STATE v. WILLIAM GAFFNEY.

The general rule is, where an accusation includes an offence of inferior degree, the jury may discharge the accused of the higher crime and convict him of the less atrocious.

An indictment under the act of 1821, for the *murder* of a slave, includes within it the inferior offence of "killing in sudden heat and passion," to the same extent and for the same reasons, that *murder* at common law includes manslaughter; and therefore, on *such an indictment*, the prisoner may be convicted of the inferior offence described in the second clause of the act, "of killing on sudden heat and passion."

In England, it seems that on an indictment for a *felony*, the defendant cannot be convicted of a *misdemeanor*, and that a count for a *misdemeanor* cannot be joined with a count for a *felony*: The reason assigned for which, (to wit, that persons on trial for *misdemeanor*, have certain privileges that are denied to persons charged with *felony*,) has no existence with us, as by an act of the legislature, (2 Brev. Dig. 188,) these privileges are extended to all persons indicted for *felony* or other crime. In this State, therefore, the rule would seem to be otherwise, and that one indicted for a *felony*, may be convicted of a *misdemeanor*.

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Before EVANS, J., at Richland, Spring Term, 1839.

THE defendant was indicted for the murder of a slave. The jury found him "not guilty of murder, but guilty of killing on sudden heat and passion."

The counsel for the defendant moved for his discharge, on the ground that the finding was equivalent to a general acquittal.

The motion was refused by his honor the presiding judge, who remarks in his report, "I thought the point worthy of being considered. It would be a very convenient practice to include both offences in the same indictment, so that one trial might suffice. If this finding is an acquittal, it would seem that counts for both offences cannot be joined in the same indictment; and if the evidence does not make out a case of murder, he must be indicted a second time for the other offence."

The defendant now moved this court to arrest the judgment in the case stated, so far as he is found guilty of killing the slave in sudden heat and passion, upon the following grounds:

1. That the finding of the jury is equivalent to a general acquittal.

2. That upon an indictment for murder, under the act of 1821, the defendant cannot be found guilty of killing in sudden heat and passion, under the second clause of that statute.

The defendant also moved to reverse the decision of his honor, refusing to discharge the prisoner: Because, having been acquitted of the offence with which he was charged by the indictment, he was entitled to his discharge.

CURIA, per EARLE, J. If this were an indictment for murder at common law, a verdict of manslaughter would be good; or a count for manslaughter might have been joined. The form is the same, except that in a count for manslaughter, the words "murder," and "malice aforethought," are omitted. When on a general count for murder, the jury find manslaughter, they only negative the malice. It is said, and with good reason, by Mr. East, in his Pleas of the

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Crown—"In most cases where justice requires a man to be put on his trial for killing another, it is usual and proper to charge him in the indictment for murder; because in many instances it is a complicated question, and no injury can thereby happen to the individual, at all comparable to the evil of a lax administration of justice in this respect, for the verdict and judgment will still be adapted to the nature of the offence." The general rule is, when an accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime and convict him of the less atrocious. But it seems to be supposed, that on indictment for felony, the defendant cannot be convicted of a misdemeanor: and for the same reason, a count for misdemeanor cannot be joined with a count for felony. The reason given by Mr. Chitty, both in regard to the finding and the joinder, is, that the defendant would thereby lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel.—Chit. Crim. Law, 252, 639. And such was the decision in *Westbeer's case*, Str. 1133. Before, the law had been otherwise; as in *Seeser's case*, Cro. Jac. 497, where it was held, on an indictment for felony in entering a house and stealing 18 pence, if the jury find a special verdict that the money was obtained by playing with false dice, the court may give judgment for the trespass and misdemeanor. And in *Holmes' case*, cited in *Kelyng*, 29, where he was indicted for, "that being possessed of a house in London, he did feloniously set on fire his own house and burnt it, with intent to burn the houses of other men near adjoining;" and being found guilty, the court doubted whether it was felony or no: and on advising, agreed it was not; but gave judgment against him as for a trespass. In *Westbeer's case*, the court said, "the judges (in those cases) appear to be transported with a zeal too far." The reason given, why on an indictment for felony the jury may not find for misdemeanor, and why counts for each may not be joined, is not true in this State. While in England, (4 Blk. Com. 555,) persons on trial for misdemeanor, have privileges that are denied to persons charged with felony, as a copy of the indictment and full defence by counsel; here it is otherwise, and by act, 2 Brev. Dig. 188, these privileges are extended

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to all persons indicted for felony or other capital crime. There is, in fact, the same reason for allowing this practice here, that is given, why on an indictment for petit treason in England, one may be convicted of murder ; that he has a larger number of peremptory challenges, and thereby enjoys a higher benefit instead of losing any privilege. In the case we are supposing, the defendant would gain by being indicted for felony, the whole number of challenges; which would more than compensate him for losing the privilege of an imparlance one term. We conclude then, that here, one indicted for felony, may be convicted of a misdemeanor, which makes it unnecessary to consider whether killing a slave in sudden heat and passion, be a felony or a misdemeanor ; or to consider the grave question raised in argument, whether before the act of 1740, the homicide of slaves stood upon the same footing as that of white men at common law.

The next inquiry needful to be made, is whether under the act of 1821, the murder of a slave includes within it the inferior offence of killing in sudden heat and passion, to the same extent, and for the same reason, that murder at common law includes manslaughter. In *Cheatwood's case*, 2 Hill. 459, which was tried before me on the circuit, I had instructed the jury, "that cases arising under the act, were to be determined according to the principles and rules of the common law, and that I could admit no other distinction between the killing of white men and that of negro slaves, than this, that in the latter case a smaller degree of provocation would have the effect of extenuating or excusing, as the case might be." This proposition received the confirmation of the Court of Appeals, who held that "the purpose of the act was to make the killing of a slave, the same offence as the murder of a freeman, at common law ; that the words used in the first clause of the act, and particularly the word "deliberately," were used in contra-distinction to the terms of the second clause, which provides for the offence of killing in sudden heat and passion ; that those words, "sudden heat and passion," are technical words of the common law, to describe the offence of manslaughter, and to the common law we must resort for their definition." Mr. Justice Colcock, be-

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fore, in Rain's case, 3 M'Cord. 533, had said, "murder is a technical word of the common law, and when used by the legislature must receive its technical construction." The words "killing in sudden heat and passion," are entirely synonymous with "killing in sudden heat of blood, and transport of passion," which are usually employed in the books to define manslaughter. In Rains' case it was decided, that in indictments under either section, it was indispensable to describe the offence with all its circumstances, constituting the manner of killing, the weapon, wounds and the like, with the same minuteness as in indictments for homicide at common law. On the trial, upon the general charge of murder, the same proof must be made as on the other charge of killing in heat and passion, with the additional facts of malice and deliberation. The defendant cannot be misled, for it is the same killing that forms the body of the charge in either case ; and he is equally apprised of the nature of it, so as to bring forward his proof. And the verdict of "killing in sudden heat and passion," establishes that there was a killing, that although there was no malice, there was also no sufficient excuse ; just as a verdict of manslaughter has the same effect in indictments for murder. It negatives the malice only. We conclude, therefore, that under the act, the greater offence includes the lesser, to the same extent and for the same reason, that murder includes manslaughter at the common law. Rains' case was referred to in argument, as having decided that under the act, a verdict of manslaughter would be bad ; and it was so ruled. The point was not necessary to be decided, as the indictment was held defective and a new trial was granted on another ground. But I do not regard that decision as affecting the present question. The reason assigned there, was that the punishment under the act is different from that of manslaughter at common law ; and as judgment could not be given for that, none could be given for killing in sudden heat and passion. That may be admitted without overturning our conclusion. It is supposed, however, to be at variance with the rule of criminal pleading, which requires statutory offences to be set forth precisely in the words of the act. In point of fact, the charge of murder is set forth sufficiently. The true ob-

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jection is, that killing in sudden heat and passion, is not laid in the indictment, and therefore the defendant cannot be convicted of it. If this objection had been made on the trial, the answer would have been, "the defendant is on his trial for killing a slave, with malice, the degree of guilt depends on the proof—and the offence will be established by the verdict." The offences are in fact, only different degrees of guilt arising out of the same killing, and the verdict having acquitted of the murder, may be considered as inserting the words necessary to constitute the inferior offence, and thus makes the record a bar to another prosecution; or, it may be regarded as a special verdict, which the jury have the same right to find in criminal as in civil cases, and the degree of guilt is a conclusion of law, from the facts found. We think there is the same reason for allowing this course in statutory offences, as in offences at common law, where both the higher and lower are created by statute. If only the lower were created by statute, and the indictment concluded at common law, there might be an objection for want of the words, *contra formam statuti*. That does not lie here.

It is supposed that the offence under the act of 1740, of killing by undue correction, still exists, although Mr. Justice Colcock thought otherwise in Rains' case; and that if a case of that kind were made out on the trial of the indictment for murder, the defendant must be acquitted. There is no propriety in considering a question which does not arise. But I perceive no good reason, if it be actually a subsisting offence, why it should not be included in the felonious charge, and why the jury may not find such a verdict specially, as at common law they might, on a charge of murder, find manslaughter, or homicide in self defence, or by chance medley. These last, although not felony, were regarded as offences, and created a forfeiture of goods. The defendant was obliged to purchase a pardon and discharge, by paying a fine to the king.—There is an advantage in the practice now established. It relieves the Solicitor of the responsibility of deciding before hand for what offence he will indict; it prevents the danger and delay of several trials; is really beneficial to the accused in enlarging his privileges, if the inferior offence be only a misdemeanor, which we

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by no means intend to say ; and if indicted for the murder and found guilty of the other offence, or acquitted, the verdict is a bar to any future prosecution ; whereas it would be otherwise if indicted only for the inferior offence. The court is of opinion that the finding is a good verdict, under the second section of the act for killing in sudden heat and passion, and that the defendant must have judgment for that offence.

O'NEALL, RICHARDSON, BUTLER and EVANS, Justices, concurred.

Gregg & Desaussure, for the motion.

Edwards, Solicitor, contra.

THOMAS ROSEMAN v. JOHN HUGHEY.

A bill of sale of a negro, in the usual form, contained a warranty in these words, "to have and to hold, all and singular, the said negro man George, and I do hereby bind myself, my heirs, executors, administrators and assigns, to forever *warrant* and defend the said negro unto the said Thomas Roseman," &c. HELD to be a *warranty of title* merely, and not of *soundness*. (O'NEALL, J., dissenting.)

Before O'NEALL, J., at Abbeville, Fall Term, 1838.

THIS was an action of covenant on a bill of sale for a negro.—The warranty was, and I do hereby bind myself, &c., "to warrant and forever defend" the said negro to the plaintiff. The breach of warranty assigned was the unsoundness. The defendant demurred on the ground that the warranty extended only to the title and did not cover the soundness of the negro.

Roseman v. Hughey.

His honor the presiding judge, thought the warranty was so general, that it included both title and soundness, and overruled the demurrer.

The defendant appealed and now moved to reverse the order of the court below, because the bill of sale contained no warranty of *soundness*, and the breach alleged is therefore no violation of the covenant set forth.

CURIA, per EARLE, J. The question which arises upon the covenant of warranty contained in the bill of sale, is one of construction, depending on the intention of the parties; and this is to be collected from the subject matter of the sale and the terms employed. The doctrine of warranties, in the old books, is wrapped up in the abstruse learning of the law, and would be out of place here. Warranty, although known to the civil law, is yet a common law term; and in its original definition, "is a promise, or covenant by deed, made by the bargainor for himself and his heirs, to warrant and secure the bargainee and his heirs, against all men, for enjoying the thing granted."—Jac. Law Dic., who cites Bract. Lib. 2, 5. And so in Termes de la Ley, "guaranty is where one is bound to another, who hath the land, to warrant the same to him, which may be by two ways, that is by act of the law, &c., or by deed of the party who grants by deed, or fine, to warrant it to him." From this it would seem, that warranty, when used in a deed conveying lands, without more, refers to title; and that he who covenants that he will warrant and defend the premises to the bargainee, covenants that the bargainee shall enjoy the thing granted. It is a covenant to warrant and defend the title, and not that the land is of a particular description, value, or quality. Even after the execution of a deed, containing such a warranty of title, a purchaser may, on proof of parol representations made at and before the sale, concerning the description of, quantity or quality, have his remedy if the land do not correspond. On the sale of personal chattels, neither deed nor other writing is necessary.—The title passes on delivery; and in regard to warranty the rule is different. If a purchaser of land accept a deed, conveying the

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same without covenant of warranty, none is implied by law, even as to title. In regard to chattels, on every sale, the law implies a warranty of title, the vendor being in possession, and making delivery. In such case at common law, there was no implied warranty of soundness. Here it is otherwise; but the warranty of soundness is implied only on payment of a full and fair price. The parties have reduced the contract to writing, and a bill of sale under seal has been executed by the defendant. The form is that of a bargain and sale of lands with an express covenant of title: "have granted, bargained, sold and released, to the said T. R., a negro man George, to have and to hold all and singular, the said negro man George; and I do hereby bind myself, my heirs, executors, administrators and assigns, to warrant and defend the said negro unto the said T. R., his heirs and assigns forever." The covenant of warranty, being thus put in immediate connexion with the *habendum* of the deed, seems to point the meaning of the parties to the quiet enjoyment of the property and not to the soundness or qualities. Such I think would be the construction of the covenant, on the legal import of the terms; and such too, would be the interpretation according to the common sense and understanding of mankind. A warranty of soundness, is certainly no warranty of title; and where the terms used are such as to import clearly a warranty of title, such as in other and similar instruments are known to have that meaning, and no other, it would be extending the covenant, by *intendment*, beyond the apparent intention of the parties, to give it the effect of a warranty of soundness. And the plaintiff can suffer no prejudice from this interpretation, if in fact, the sale was for such price as to raise the implied warranty of soundness. It is well settled by several cases, *Wells v. Spears*, and *Hughes v. Banks*, that an express warranty of title does not exclude an implied warranty of soundness. It cannot appear from the bill of sale, whether the price was such as a sound negro should have sold for, as there is no description. If the price were actually reduced, the defendant ought to be allowed to show that it was so, in consequence of known or visible defects; which would be prevented by construing this to be a covenant of soundness.—

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The court is of opinion, therefore, that there should have been judgment for the defendant on demurrer below. And the motion to reverse the judgment of the circuit court is granted.

BUTLER and RICHARDSON, Justices, concurred. O'NEALL, J., dissented.

Wardlaw & Perrin, for the motion.

Burt, contra.

ELEANOR SPANN, adm'x v. JOHN BALLARD.

The general rule established by all the cases is, that to render a witness incompetent on the ground of interest, his interest in the event of the suit should be a present, certain and vested interest, and not uncertain and contingent.

Where in an action by an administratrix for the recovery of a debt due to the intestate, one of the heirs at law, and a distributee of the estate who had received his share and settled with the administratrix, was offered as a witness and objected to on the ground of interest, the witness executed and tendered an assignment or release of all interest in the recovery ; it was still contended he was incompetent by reason of his liability to refund, in case of further claims against the estate not yet exhibited. HELD, in the absence of any proof of outstanding demands or deficiency of assets in the hands of the administratrix, that the supposed interest of the witness in increasing a fund out of which he could receive no dividend, was too remote and contingent to sustain the objection.

Where a bill drawn by the defendant on the plaintiff's intestate, payable to a third person or order, and indorsed by the payee with a receipt of payment on the back of the bill by another person, was in the possession of the drawee, HELD that the presumption of payment arising from the possession of the bill was insufficient, without proof that the receipt was in the hand writing of a person entitled to demand payment, or other sufficient evidence of payment aliunde.

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Before EARLE, J., at Sumter, Spring Term, 1839.

THE report of his honor, the presiding judge is as follows :

“ The defendant, together with one William R. Lenoir, drew a joint order or bill upon the plaintiff's intestate, Charles Spann, jr., who was a factor in Charleston, for a debt of Lenoir, payable to one Baskett or order, and endorsed in blank. The plaintiff produced the bill which by a receipt on the back, appeared to have been paid to a person whose name did not appear upon it. James T. Spann, a son of the intestate and of the plaintiff, his widow, was produced as a witness, and was objected to on the ground of interest in the subject of the suit. He tendered an assignment and release. It was replied that the ground of objection was, that the witness, as one of the heirs at law, was liable to refund, in case of future debts being exhibited against the estate, and was therefore interested in increasing the fund in the hands of the administratrix. The other ground of objection being waived, I thought this latter interest too remote and contingent to render the witness incompetent. He deposed that the bill was paid on presentment to the drawee in Charleston. That he called on the defendant after the death of the intestate, for payment, who admitted that he had given or drawn the bill, that it had been paid and that he was liable ; but objected to pay it, because he had given directions to retain the amount out of the proceeds of Lenoir's cotton, which had been sent to the intestate, and been sold by him. The proceeds had been applied to other orders drawn by Lenoir. It was proved that Lenoir had sent seventeen bales of cotton to the intestate.

It was objected on a motion for nonsuit, that the proof of payment by the drawee was insufficient. That it was not proved to have been made to a person authorized to receive it. I held that proof of the transfer was not indispensable, as there was other evidence of payment than the mere possession of the paper, and left it to the jury whether in fact the sum had been paid or reimburs-

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ed out of the proceeds of Lenoir's cotton. They found for the plaintiff.'

The defendant appealed, and now moved for a new trial on the following grounds :

1. That the testimony of Mr James T. Spann was improperly admitted ; he was a distributee of the intestate, and having received his share of the estate, would be liable for any debts which the estate may now or hereafter be made liable for.

2. That there was no satisfactory and legal proof of payment to a party entitled to receive.

3. That the intestate received funds of Wm. R. Lenoir, one of the drawers, sufficient to pay the draft, and ought so to have applied them.

CURIA, per EARLE, J. The general rule, established by all the cases, is, that in order to render a witness incompetent, his interest in the event of the suit, should be a present, certain, and vested interest, and not uncertain and contingent ; it is defined by *Ld. Ch. Baron Gilbert* to be " a certain benefit or disadvantage to the witness, attending the consequence of the cause, one way." *Law of Ev.*, 225. The witness therefore, as an heir at law of the intestate, and a distributee of his estate, had a direct interest in increasing the fund, out of which he might receive a dividend, and on that ground was incompetent, *2 Bay*, 542. But it was an interest, which might be assigned or released, and thus the competency of the witness would be restored. *Ex'r of Christie v. Ex'r of Furman*, *Mss. D. Nov.*, 1827. This having been tendered, and the objection waived, it is supposed the witness was still incompetent, by reason of his liability to refund, in case of further claims against the estate, not yet exhibited. But as there was no evidence offered of any such outstanding demands, or of any deficiency of assets in the hands of the administratrix, it would seem, that the interest of the witness in increasing the fund, out of which he could receive no dividend, was not only extremely remote, but entirely contingent ; depending upon the fact of there being such outstanding

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demands, of their being established by proof, and of there being a deficiency of assets. All this could not be, except on the supposition, that the settlement of the estate was false and fraudulent, which is not to be presumed. If authority were needed to sustain the proposition, it will be found in *Smith v. Blackham*, 1 Salk. 283. The heir of a bankrupt was brought to prove a debt due to him, in an action by the assignee; and it was objected, that the surplus of the real estate (which was only to come in aid of the personal estate,) being to go to the bankrupt, and his heirs, the heir by swearing to increase the personal estate, has this benefit, as to so much. But Treby, Ch. J. allowed him to be a witness, saying, that was too remote a contingency. And in *Carter v. Pearce*, 1 Term R. 163, a surety in an administration bond, was admitted to prove a tender by the administrator. The court said, "the bare possibility of an action being brought against a witness, is no objection to his competency. *Ogier v. Deas*, 1 Bail. 473, is also a case directly in point.

To enable the plaintiff to recover, it was necessary to prove payment of the draft, by the intestate. And as it had been endorsed by the payee, before presentment, the mere production of it from the custody of the drawee, even with a receipt endorsed, may have been insufficient to authorize a presumption of payment, without proof that the receipt was the hand writing of a person, entitled to demand payment. Such was the decision of Ld. Ellenborough in *Pfiel v. Vanbatenburg*, 2 Camp. N. P. Rep. 439, cited at the bar. But here there was surely other, and sufficient evidence of payment, in the admissions of the defendant himself. He not only admitted that the draft had been paid, but that he was liable for the amount; of course to the plaintiff, for the demand was made on her behalf. It could not be otherwise, than that the payment was made to one authorized to receive it.

The other point that the drawee had funds of Lenoir, which he ought to have applied to the draft, was for the jury. There seems to have been no proof of the cotton of Lenoir, having been consigned by the defendant, although received by his boat; or that he

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had any authority, to direct the application of the proceeds, so as to supersede the control of the owner.

The motion for a new trial is refused.

RICHARDSON, O'NEALL, EVANS and BUTLER, Justices, concurred.

Desaussure & Garden, for the motion.

Watson, contra.

SAMUEL GUTHRIE v. JAMES JONES.

Jones, the defendant, purchased a tract of land of Guthrie, the plaintiff, for which he gave two sealed notes for \$50 each, one payable on the 25th of December, 1836, the other on the 25th of December, 1837. The plaintiff by a separate instrument in the form of a bond covenanted and agreed with the defendant "to make him a good and lawful title to the land if the notes were paid." HELD that, until the actual payment of the notes, the plaintiff was not bound to make titles to the land and that his failure to do so in the mean time furnished no ground of defence to an action on either note.

Before EVANS, J., at Spartanburg, Spring Term, 1839.

The report of this case, by his honor, the presiding judge, is as follows:

" This was a summary process on a sealed note for \$50. Defendant purchased a tract of land from plaintiff, and gave two notes, each for \$50, one payable 25th December, 1836, the other 25th December, 1837. Upon this last note the action was brought. It was not proved whether the first was paid or not. The plaintiff made no title, but gave a penal bond to " make a good and lawful title " to the land, if the notes were paid. Before this action

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was brought, Jones sold the land to Price, who was ready to pay up the note, if a good title was made. Jones called on Littlejohn, the plaintiff's agent, who held the note, and told him Price would pay for the land, if the title was good. They went to Price, and Littlejohn produced a deed executed by Guthrie and wife, in Arkansas. It was in form nearly like the deed of bargain and sale, prescribed in the act of assembly of 1795, 2 Faust, 5, but there was but one witness, and there was no clause of general warranty. Price refused this title, and the note was then sued. The plaintiff contended—1st. That Jones was bound to pay the money without any title, and must look to his bond. 2d. That the title produced was such as Guthrie was bound to make.

I did not consider the making a title as a condition precedent to be averred and proved; nor was the plaintiff bound to tender a title before suit brought. The covenant as originally made, was independent, and the plaintiff not bound to make a title until he was paid the price, as was decided in *Davis v. Woodward*, 2 Const. R. 56. But in this case the money had been tendered, or to speak more accurately, was ready and not paid, because the title was objectionable. I thought therefore, after this demand, the plaintiff could not coerce payment by law, until he tendered such a title as he was bound to make by his bond. Whether the deed tendered was such as the party was bound to make, is a question not free from difficulty. It is not good as a feoffment, for want of livery of seizin. It is not a lease or release, and is not good unless as a bargain and sale. Whether that form of conveyance was used in this State before the act of 1795, and therefore recognised by the act as a valid form, I was of opinion the obligation of the plaintiff required of him to give the defendant a deed with a general warranty, and as this deed is defective in this particular, the plaintiff cannot recover."

The plaintiff appealed, and now moved to reverse the decree of his honor, because the decree is contrary to law and evidence; the payment of the money being a condition precedent to the delivery of the deed; the tender to Littlejohn being no tender to the plaintiff, and the deed offered being agreeably to the condition of

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the bond, the defendant's remedy was on the bond and not by way of defence.

CURIA, per EARLE, J. The decree of the circuit court can only be sustained, on the ground that this is a case of dependent and concurrent covenants ; and although the payment of the money was the consideration for which the title was to be made, yet that they were acts to be mutually performed at the same time. And if the defendant was ready to pay, and offered to pay, he did all that was necessary to entitle him to demand performance, on the part of the plaintiff. If this be the true construction, then the plaintiff could not recover, without averring and proving like readiness, and offer to perform on his part. Now, as the plaintiff held the defendant's note, which is a direct and unconditional engagement to pay a sum of money, on a day certain, without reference to any act to be done by him before the day, he had only to sue, and declare on it, in the usual form, after the day was passed.— The defendant held the plaintiff's bond, in a penalty, with condition to make titles, if the notes were paid. If the defendant had brought an action on the bond, he must have averred payment of the notes, in the declaration, and would have failed at the trial, without proof of actual payment. An offer to pay, even an actual tender of the money, but withholding it because the title was not made, would not have sufficed. The actual payment of the money by the defendant, was a condition precedent, before he could demand a conveyance. Such would be the construction, if the agreement to pay the money, as exhibited in the note, and the covenant to make titles, as exhibited in the condition of the bond, were contained in one deed, executed by both. The intention of the parties would be manifest from the terms employed. It is more clearly manifested, by executing separate instruments, the defendant giving notes payable at different, but certain days ; and the plaintiff giving his bond, to make titles if the defendant paid the notes. If the defendant could not have demanded a conveyance, on payment of the first note, he could not until after payment of both. And if without actual payment, he was not entitled to have

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a conveyance, it is immaterial to the issue, whether the conveyance executed by the plaintiff, was a good and lawful title, or not. It is enough, as said by the court, in *Davis v. Woodward*, 2 Const. Rep. 56, (Mill.,) if he shall be ready to perform his engagement, when the notes shall be paid. If he fails, then, to make such a conveyance as his bond calls for, he must suffer the consequences of his failure. We cannot agree that the execution of an imperfect conveyance before any could be demanded, changed the position of the parties, or the condition of the covenant; that it relieved the defendant of any obligation, or waived any right on the part of the plaintiff.

The motion to set aside the decree of the circuit court is granted, and a new trial ordered.

O'NEALL, EVANS and BUTLER, Justices, concurred.

Henry & Bobo, for the motion.

H. H. Thompson, contra.

JAMES BOATWRIGHT v. JACOB BOOKMAN, DANIEL BOOKMAN, THOMAS ASHFORD, THOMAS WATT and GEORGE TURNIPSEED.

The plaintiff had constructed a fishery consisting of several fish traps, on a line between the adjacent islands in the *Congaree* river, at a distance of eighty or ninety yards with the customary dam; having obtained the permission of the proprietor to use the shores of the islands for that purpose. The defendants, professing to be performing their duty as commissioners of fish sluices on Broad River, cut away and destroyed one of the traps and thereby opened a sluice which rendered the traps of no value. **HELD**, that an action of trespass *vi et armis*, would lie for the injury—and plaintiff having obtained a verdict, a new trial was refused.

The right of fishery in the public *navigable* rivers of this State, considered at length and recognised.

Boatwright v. Bookman et al.

Before EARLE, J., at Richland, Spring Term, 1839.

THE following is the report of his honor the presiding judge :

“ The plaintiff had constructed a fishery consisting of seven traps, on a line between the adjacent islands in the Congaree, a distance of eighty or ninety yards, with the customary dam; having obtained the permission of Mr. Guignard, the proprietor, to use the shores of the islands for that purpose. The traps were put up in the autumn of 1837. In March, 1838, the defendants with their servants and others, cut away and destroyed one of the traps, and thereby opened a sluice which rendered the other traps of no value. The defendants professed to be performing their duty as commissioners of fish sluices on Broad River, and to be acting under a resolution of the legislature appointing them, passed December, 1837. It appeared on examination, that two Boards were appointed at that session, consisting of six commissioners each; one for Broad River, beginning at Granby, and the other for Broad River in Fairfield district. Two of the defendants were members of both Boards, and two others were also members of the latter board.— Previous to the time of the alleged trespass, it was proved that no boat sluice had ever been opened, and no fish sluice had ever been designated or opened, between the two islands where the plaintiff's traps were; and three witnesses for the plaintiff proved, that in their opinion, the place was unfit either for a boat sluice or a fish sluice. Yet the true commissioners on that part of the river afterwards designated a fish sluice there.

The actual cost of building each trap was ten dollars. Fourteen laborers, two of them white men, were employed six days in making the dam and placing the traps in the river; from which it would seem that the actual cost of the whole fishery was one hundred and sixty or seventy dollars, and of each trap, about twenty-three dollars.

On a motion for nonsuit, the court held that the Congaree there, is a public navigable river—that the whole stream, however, was not to be considered a highway for the purposes of navigation;

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and that an individual might acquire a right of private property in a fish trap, erected by himself in a part of the river not used for navigation, if the place were not designated and reserved by public authority as a sluice for the passage of fish. It was considered that the defendants, although a majority of the board of commissioners of fish sluices on Broad River in Fairfield, yet had no authority below on the Congaree, where the plaintiff's traps were, and that they were guilty of a trespass on the plaintiff's property.

The amount of damages was submitted fairly to the discretion of the jury, with the single remark, that they ought, by their verdict, to compensate the plaintiff for his actual injury. The jury found for the plaintiff seventy-five dollars."

The defendants now renewed the motion for a nonsuit, in the Court of Appeals, upon the grounds taken on the circuit.

1. That the Congaree is a public navigable river.

2. That the dam and fish traps erected by the plaintiff, and obstructing the navigation of the river, as well as the passage of fish, for the space of ninety yards, from one island to another, is a nuisance.

3. That an action, and especially trespass *vi et armis*, will not lie for opening a passage through this obstruction, by removing one of the traps, and so forth.

In the event that the nonsuit should not be granted, the defendants moved the Court of Appeals for a new trial, upon the grounds:

1. That the fish traps were proved to be worth only ten dollars.

2. That the plaintiff sustained no other loss by the removal thereof; and,

3. That all the circumstances attending the transaction were clearly in extenuation of the conduct of the defendants, whilst there was not a single aggravating circumstance, and therefore, the verdict of the jury was against the evidence in this particular.

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CURIA, per EARLE, J. The question raised in argument, whether the plaintiff's trap was a fixture or not, does not seem to be material to the case. If he had a right to put it in the river, in the exercise of his privilege of taking fish, which he enjoyed in common with the rest of the community, it was his property, and he had a right to remove it.—Cro. Car. 228. In that case, the public acquired no right to it; and if not a public nuisance, or other public injury, to be redressed by law, or abated by public force, the public could no more claim it or destroy it than an individual. Still it was not in legal parlance, the close of the plaintiff.

Several other questions have been made in argument, on which the court does not conceive it necessary to express an opinion.—We need not decide whether the rule of the English law prevails here or not, nor whether there be, in effect, any difference between the rule there and in Pennsylvania. We need not decide whether the Congaree was originally navigable, or made so; nor whether, in one case, or in the other, the owners of the soil, on either side, would possess any exclusive right of fishery, and to what extent. The court is satisfied that the Congaree is now to be deemed and taken as a navigable stream. Whether the public is the actual owner of the soil, covered by water, in rivers of this description, or has merely a servitude for the public interest, as a highway by water, may deserve consideration; and would depend perhaps, on the grants, which we have not before us, or on the acts regulating the issuing of grants for lands, which have not been brought to our view.

Whether the land covered with water belongs to the owners of the adjoining lands, or to the public, it is a public river, (*juris publici*), and nuisances and impediments therein are liable to be punished by indictment. We have no doubt that the right of taking fish there, was common in equal degree to the whole community.—Whether an exclusive right could be prescribed for, is not necessary to be considered. The river being a public highway, all obstructions and impediments to the free passage and navigation thereof, would be public nuisances, and punishable by indictment, or liable to be abated.

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The question then is, was the trap, or line of traps, claimed by the plaintiff, such an obstruction and impediment, as to come within the description and meaning of a public nuisance. An obstruction to the passage of fish, may be a private nuisance where it affects a private right. An obstruction to the navigation would certainly be a public nuisance; and I incline to think, contrary to my first impression, that an obstruction to the free passage of fish in a public navigable river, is also a public nuisance. The question in this case, then, depends on this, could the plaintiff have been indicted for a public nuisance? And this depends more, perhaps, on the provisions of the different acts of the legislature, than on other proof. The privilege of taking fish in our public rivers, by means of traps, has been immemorially exercised. I think it is now too late to hold, that a fish trap of itself is an obstruction and nuisance. This right is recognized by very many acts of the legislature, beginning at an early period. On this river and some others, the legislature has adopted regulations concerning both navigation and the passage of fish. The act of 1827 is passed expressly to prevent obstructions to the passage of fish up several rivers, including the Congaree; appointing boards of commissioners of fish sluices, to have regular succession, every three years, to open and keep open sufficient sluices, for the free passage of fish. This act recognizes and regulates the exercise of the right to erect traps, by making it a public nuisance to erect them within eighty yards of any dam, built by order of the State, to aid navigation. If indictable as a nuisance and punishable by a fine of twelve dollars, to put a trap within eighty yards of such dam, it would seem to follow that it is not of itself a nuisance, to put a trap more than eighty yards. And if a fish sluice be designated and opened, to obstruct which is indictable as a nuisance, it would seem to follow as an unavoidable conclusion, that the legislature did not consider a trap elsewhere as a nuisance.

The act of 1828, after fish sluices had been designated and opened in this part of the river, again recognized the right to put traps, except within certain boundaries prescribed, near the dams at the head of the canal. But the act of 1829, making it indictable as a

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larceny to steal fish out of a trap, with intent to defraud the owner thereof, more explicitly recognizes the right to put traps in the river, and regards both them and the fish taken in them, as private property. By the same act it is made a misdemeanor to put a trap in or near a boat sluice, so as to obstruct or injure the navigation. The plaintiff's traps were not in or near any boat sluice; nor were they an obstruction of any fish sluice. They therefore could not constitute a public nuisance, so as to be indictable; or liable to be abated by private force. The institution of boards of fish sluices on all the principal streams, every three years, who are required to designate periodically, and to open adequate sluices for the passage of fish, which are protected from all obstructions by indictment, with adequate penalty, supersedes any other proceeding, by the public, on account of impediments, by traps, to the free passage of fish.

The defendants were guilty of a trespass by destroying the plaintiff's traps, and the verdict must stand. Their motion is refused.

O'NEALL, RICHARDSON, BUTLER and EVANS, Justices, concurred.

Gregg & Black, for the motion.

Tradewell & Desaussure, contra.

T. JENNINGS et ux. et al. v. JAMES WEEKS, Adm'r.

On an appeal from a decree of the ordinary, making the administrator of an estate liable for the amount of a debt lost by his want of diligence, HELD that the liability of the administrator upon the facts reported by the ordinary, was a conclusion of *law*, proper for the court, and not a question of fact to be submitted to a jury.

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The administrator of an estate, held the note of a third person given to the intestate, which fell due on the first of January, 1823. The writ, on which judgment was obtained, did not issue until October, 1826, nearly four years afterward, in the meantime the party became insolvent. HELD that the decree of the ordinary, charging the administrator with the amount of the debt, as having been lost by his laches, was correct, and properly affirmed by the circuit court.

The act of 1799 provides for the right of appeal from the ordinary to the circuit court, and is not limited to any specific classes of cases. The circuit courts are required to hear such appeals, "and all matters of fact shall be tried by a jury." There seems to be no sufficient reason for saying that the right of jury trial in such cases, shall be restricted solely to questions of *devisavit vel non*.

The correct course of practice, on appeals from the ordinary, indicated.

Before EARLE, J., at Sumter, Spring Term, 1839.

This case came up on an appeal from the ordinary. It appeared from the report of the ordinary, that on the final settlement of the estate of Kelly, of which the plaintiff in appeal was administrator, the ordinary held the administrator accountable for the amount of a note of one Gibbs, given to the intestate which he had failed to collect, and gave a decree against him for that sum. On hearing the appeal, counsel moved for leave to examine witnesses as on a trial *de novo*, and to submit the cause to a jury, which was refused by the presiding judge, and the decree of the ordinary was affirmed on his report of the facts.

The administrator appealed, and now moved this court to set aside the order in this case, made below, and for a new trial, on the following grounds :

1. That his honor, judge Earle, erred in refusing the evidence to be submitted to the jury *de novo*.
2. That his honor erred in refusing to let the case go to the jury ; the question of due diligence involving matters of fact, which by the act of the legislature are to be determined by a jury.
3. Because the order is in other respects against law, evidence and justice.

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CURIA, per **EARLE**, J. The practice on appeals from the ordinary has been various, and it is not the intention of the court to review all the cases, in which the question now made has been glanced at, for it has no where been expressly decided, one way or the other. Such a review is not necessary for the purpose of deciding this case.

The question, whether the administrator was liable for the amount of Gibbs' note, on the facts reported by the ordinary, was a conclusion of law, and not an issue of fact proper to be tried by a jury. All the facts relied on by the administrator, as an excuse for not collecting the note, were contained in the report of the ordinary, or admitted before the court. To submit it to a jury to say, in such a case, whether the administrator should be held liable, would be a departure from principle and precedent. It would withdraw from the ordinary and the courts, all questions of accountability, on the settlement of estates, by administrators and other trustees; and questions of legal liability, on a given state of facts, admitted or proved, instead of being determined in the proper forum, according to settled legal rules, would depend on the varying caprice of juries. If the liability was a question of law, it would have been an idle and useless form, to send the case to the jury, merely to obey, and record the instructions of the court. Such course is not required by the letter or spirit of the act of 1799, regulating appeals from the ordinary. On the facts before the court, as reported by the ordinary, there can be no doubt, his decree was right. The note of Gibbs' fell due 1st January, 1823; and the writ on which judgment was obtained, did not issue until October, 1826, nearly four years after. Supposing him not responsible, for the incapacity or negligence of the attorney, who issued the first writ, when the action failed, even that did not issue until the autumn of 1824, nearly two years after the note fell due; and Gibbs remained solvent up to that time, and failed. In the case of *Odell v. Young*, decided in December, 1838, it was held, that a guardian suffering a note given, on the sale of an estate, with sufficient security, to stand for more than a year after due, in which

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time the makers failed, was liable for the amount, (Eq. Dec.) The decree of the ordinary was properly affirmed.

As a question of general practice has been made, in regard to appeals from the ordinary, it is regarded as a fit occasion to express our opinion. The act of 1799 provides for the right of appeal to the circuit courts; and it is not limited to any specific classes of cases. The circuit courts are required to hear such appeals, "and all matters of fact shall be tried by a jury." The court does not perceive any sufficient reason for saying, that the right of jury trial in such case, shall be restricted solely to questions of *devisavit vel non*. The language is general, and imperative; and the party appealing may claim the benefit of it, which the court cannot withhold. But he must present his case, in such shape, as will enable the court to determine whether it be really a question of law for the decision of the court, or of fact proper for the jury. And this he should do at the earliest day, so as not to delay the adverse party. He should give the requisite notice assigning errors; and should file, before the next succeeding term, his suggestion, setting out the decree of the ordinary, of which a copy should be annexed, and assigning the errors of which he complains. If they be errors of law, they should be so stated, and by concluding with a verification, the appellee will be able to make the question for the court, on demurrer. If they be questions of fact, and are so stated, the suggestion may conclude with a prayer that the matters be inquired of by the country. If the errors be partly of law and partly of fact, they ought each to be designated if possible, so that the appellee may demur to the legal exceptions, and take issue on the facts. If they are so mixed up, that they cannot be separated, then the whole issue, of necessity, must be treated as one of fact. Without prescribing an invariable course, to be pursued without exception, it seems that such a mode of pleading, as that indicated, would be very proper to be adopted in practice; and would avoid the confusion which must arise from mixed issues.

In the case before us, the appellant had never tendered any issue at law, or fact, although several terms had intervened; and could

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hardly claim to delay the adverse party, longer, even if the question had been one of fact.

The decision of the Circuit Court is affirmed, and the motion dismissed.

EVANS, BUTLER and RICHARDSON, Justices, concurred.

Watson, for the motion.

Moses, contra.

NOTE.—In the case of *Southerlin et al. v. M'Kinney et al.* ante. p. 35, the court decided "that on an appeal to the court of COMMON PLEAS from the decision of a court of ORDINARY establishing a will, the correct practice is, for the appellants to file a suggestion, setting forth the proceedings in the *Ordinary's Court*, and then to assign, specifically the supposed errors in the judgment of that court." The court further held, "that in *such a case* the appellants are to be regarded as the actors and affirmants of the truth of the issues before the court, and bound to open the case, and entitled to the reply in evidence and argument." The same point was decided afterwards, in the case of *Tillman et al. v. Hatcher*, ante. p. 271. In the principal case, the court says, "that it does not perceive any sufficient reason for saying that the right of jury trial on appeals from the ordinary should be restricted solely to questions of *devisavit vel non*. The language of the act of 1799 is general and imperative; and the party appealing may claim the benefit of it, which the court cannot withhold. But he must present his case *in such shape* as will enable the court to determine whether it be really a question of *law* for the decision of the court or of *fact* proper for the jury. See the opinion of the court in the latter case, delivered by EABLE, J., in which the *correct practice* in such cases is pointed out, and which seems to be in entire accordance with the cases of *Southerlin et al. v. M'Kinney et al.* and *Tillman et al. v. Hatcher*. R.

[The following cases, decided in the Court of Errors, at Charleston, February Term, 1839, were omitted at their regular place of insertion, from having been confounded with the Chancery cases, decided by that court, at the same term, and are now given here.]

ADDITIONAL
CASES AT LAW,
ARGUED AND DETERMINED IN
THE COURT OF ERRORS
OF
SOUTH-CAROLINA,
(AT CHARLESTON, FEBRUARY TERM,)
1889.

JOHN REDFERN v. Executors of ARTHUR MIDDLETON.
SAME v. JAMES HAMILTON.
GEORGE KINLOCH v. Executors of ARTHUR MIDDLETON.
SAME v. JAMES HAMILTON.
SARAH DEHON v. JOHN REDFERN.

In this State, as well as in England, a feoffment, with livery of *seisin* by the tenant for life of the legal estate, will bar all contingent remainders; and the rule is not modified by the circumstance, that the remainder man is an infant.

A feoffment so made, together with a release of the right of entry and action by the person next entitled in remainder or reversion HELD, to be such a title as a purchaser is bound at law to accept.

THESE were several cases tried before BUTLER, J., at Charleston, January term, depending upon the same principles, and were discussed together, and eventually decided by the Court of Errors, upon grounds applicable to each case alike by one common judgment of that court. In order to present an intelligible statement

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of the questions involved, and of the principles established by the judgment of the court, it will be necessary in presenting the cases together (as they were in fact presented to the court and considered,) to give notwithstanding a special statement of each case. The cases of John Redfern v. the Executors of Middleton and of the same plaintiff against James Hamilton, were actions of debt on a bond of Middleton, the intestate, and James Hamilton, the defendant, in the other case, to make titles to two lots of land in Tradd-street. Pleas, general issue with permission to give the special matter in evidence under the act of assembly. The cases were submitted to the court upon the following written statement of facts, signed by the counsel on both sides, to wit :

“ The bond mentioned in the pleadings, dated the 27th of April, 1836, is conditioned to make titles to two lots, No. 11 and 13, in Tradd-street. Arthur Middleton was authorized to sell the lots in question by Mrs. Dehon, and he sold them to Redfern for 7,050 dollars, and delivered possession, which Redfern had since held. Redfern paid of the purchase money 2,350 dollars, and agreed to pay the residue in five years, and to execute his bond and mortgage upon receiving titles. Mrs. Dehon tendered to the purchaser a deed of feoffment and livery of *seizin* ; also a release from herself and Alicia Middleton of all their right in the premises. Redfern refused the deeds, and brought these actions for a breach of the covenant.

The fee simple of the premises was in Nathaniel Russell, who devised the residue of his estate, including these premises, after the death of his wife to his daughters, Sarah Dehon and Alicia Middleton, for life, equally to be divided between them, and in case of the death of either, remainder as to her moiety to her husband, if surviving, for the term of his life, in trust, &c. : remainder to her children *living at the time of her death*, in fee simple to be equally divided between them ; but in the case of the failure of such issue, to the other daughter for life, with cross remainders. In 1832, after the death of his widow, partition was made of Mr. Russell's estate, and the premises in question assigned to Mrs. Dehon. Mrs. Dehon survived her husband, and has three chil-

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dren living, and one of them, at the time the deeds and livery of *seizin* herein before mentioned were tendered, was, and yet is a minor. Mrs Middleton has three children living, and one of them is also under age. Alicia Middleton and Sarah Dehon are the heirs at law of the testator. The question is, whether the deeds tendered, as herein before mentioned; are sufficient to convey a good and indefeasible estate in fee simple to the premises. If the said deeds are not sufficient to convey a perfect title, a verdict is to be entered for the plaintiff for 2,350 dollars, and interest from the 27th April, 1836. But if the said deeds are sufficient for that purpose, then a verdict is to be entered for the defendants in both cases."

His honor, the presiding judge, directed the jury to find verdicts for the defendants, in both cases, which they did.

The plaintiff appealed, and now submitted to the judgment of this court—

Whether the deed of feoffment and deeds tendered, mentioned in the above written statement of facts, are sufficient in law to convey to the plaintiff a good and indefeasible estate in fee simple in the premises, according to the condition of the bond.

The cases of George Kinloch v. Executors of Middleton and of the same plaintiff against James Hamilton, were actions of debt, on a bond signed by the intestate, Middleton, and James Hamilton, conditioned to make titles to a lot of land on East Bay. Pleas, the general issue with permission to give the special matter in evidence under the act of assembly. These cases were submitted to the court upon the following written statement of facts, signed by the counsel on both sides :

" The bond mentioned in the pleadings is dated the 27th April, 1836, and conditioned to make titles to a house and lot on East Bay. Arthur Middleton sold the house to Kinloch for \$8,500, received the purchase money, delivered possession, and gave the bond in question. He died, and his widow, Mrs. Alicia Middleton, tendered to the purchaser a deed of feoffment with livery of *seizin*, and a release, from herself and Mrs. Sarah Dehon, of all

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right and title in the premises. But Kinloch refused the deeds and commenced this action.

The fee simple was in Nathaniel Russell, who devised the residue of his estate, including these premises: after the death of his wife, to his daughters, Sarah Dehon and Alicia Middleton, equally to be divided between them, for their lives; in the case of the death of either remainder as to her moiety to her husband, if surviving, for his life, in trust, &c.: remainder to her children at the time of her death in fee simple. In case of the failure of such issue, to her sister for life, &c.

In 1832, after the death of the widow, a partition was made of Mr. Russell's estate, and the premises assigned to Mrs. Middleton. Mrs. Middleton has three children living, one of whom was, at the time of the tender of these deeds, and yet is a minor: and one of Mrs. Dehon's children is also under age.

Alicia Middleton and Sarah Dehon, are the heirs at law of the testator.

The question is, whether the deeds and livery of *seizin*, tendered by Mrs Middleton, are sufficient to convey to the purchaser a good and indefeasible estate in fee simple.

If they are not sufficient for that purpose, a verdict is to be entered for \$8,500; and if they are sufficient, a verdict is to be entered for the defendants in both cases."

His honor directed the jury to find verdicts for the defendants in both cases, which they did.

The plaintiff appealed, and now submitted to the judgment of this court—

Whether the deeds and livery of *seizin* tendered, as above stated, are sufficient in law to convey to the plaintiff a good and indefeasible estate in fee simple in the premises according to the condition of the bond.

The case of Sarah Dehon against John Redfern, was an action of trespass to try titles to the two lots of land in Tradd-street, (the same which were agreed to be conveyed by the bond of Middleton and Hamilton in the cases first mentioned.) This case was

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submitted to the court upon the following written statement of facts, signed by the counsel on both sides, viz. :

“Nathaniel Russell was seized of the premises, and devised the residue of his estate, including these premises, after the death of his widow, to his daughters, Mrs. Dehon and Mrs. Middleton, for life, equally to be divided between them—remainder to the husband, if surviving, for life, in trust, &c.—remainder to the issue respectively, if living at the time of her death—with cross remainders. A partition of the estate was made after the death of the widow, and these premises assigned to Mrs. Dehon. She contracted to sell them to the defendant for 7,050 dollars, received part of the purchase money and delivered possession, and her agent entered into a bond conditioned to make titles. She tendered to the purchaser a deed of feoffment with livery of *seizin*, and a release from herself and Mrs. Middleton, the heirs at law of the testator. But he refused to receive them. She filed a bill to comply with his contract, and the bill was dismissed. The defendant put the bond for titles in suit, and on the trial of the case a verdict was found for the present plaintiff.

When the defendant sued the bond, plaintiff demanded possession, and required him to quit the premises, which he refused—and holds possession.

The question is, whether the plaintiff can maintain this action. If she can, a verdict is to be entered for the premises, and four dollars damages. Otherwise a verdict is to be entered for the defendant.”

His honor, the presiding judge, directed the jury to find a verdict for the plaintiff, which they did.

The defendant appealed, and now submitted to the judgment of this court—

Whether the plaintiff can maintain the action upon the statement of facts above referred to.

Desaussure, for the motions.

Petigru & Lesesne, contra.

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CURIA, per **HARPER**, Ch. The determination of all the cases depends on the effect of the deed of feoffment which was tendered, in barring the contingent remainders which were created by the will of Nathaniel Russell. I am not aware that it is in my power to add any thing to what I have said in the case in Chancery between the same parties to have specific performance of the agreement between them. (Dudley's Ch. R. 115.)

The motions in all the cases are dismissed.

RICHARDSON, **O'NEALL**, **EVANS**, **BUTLER** and **EARLE**, Justices; **D. JOHNSON**, **DUNKIN** and **J. JOHNSTON**, Chancellors, concurred.

NOTE.—As it is necessary to the proper understanding of the principles established in these cases, to refer to the case in *Dudley's Chancery Reports*, it is here subjoined : R.

SARAH DEHON v. JOHN REDFERN.
ALICIA H. MIDDLETON, NATHANIEL R. MIDDLETON and RALPH IZARD MIDDLETON v. GEORGE KINLOCH.

Before his Honor Chancellor HARPER, at Charleston, June, 1837.

These bills were filed to enforce the specific performance of contracts, for the sale to defendants of certain houses and lots in Charleston, which were held by the complainants under the same title, and which they offered to convey to defendants by deeds of feoffment, to bar contingent remainders. The defendants objected to the title, and the only question was, whether the titles tendered were such as the defendants were bound by law to accept.

The facts are fully stated in the following decree, pronounced by Chancellor Harper :

Nathaniel Russell of Charleston, by his will, dated in 1819, after giving the premises which are in question in this suit, to his wife for life, devised as follows : " Item.—On the death of my wife, it is my will that all and singular of my estate be divided between my two daughters, both real and personal, of what nature and kind soever, and wheresoever situated, each a moiety or equal share of my real and personal estate in severalty, for and during the term of her natural life, without impeachment of waste, to be freely had, used, occupied and enjoyed ; and should either of my daughters die, leaving her present or future husband, then, from and after the death of such daughter, I give and devise her moiety or portion to such her surviving husband, in trust for the use of himself, and the proper support, educa-

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tion and maintenance, of all the children of such my daughters, to be held and applied by such surviving husband during the term of his natural life ; and upon and immediately after the death of my said daughters and their husbands, then it is my will that the moiety of my estate, real and personal, herein and hereby given to my said daughters for life, (and limited to further use during the life of their respective husbands as aforesaid, in the event of their surviving my daughters as aforesaid,) shall go, and I do hereby devise and bequeath the same, to the children of my respective daughters, the moiety of each daughter to be fairly divided amongst such of her children as she may have living at the time of her death, share and share alike, and to their respective executors, heirs, administrators and assigns forever : provided always, that should any child of either of my said daughters have died in the life time of the mother, such child or children are to take himself or herself, or equally among them, if more than one, that portion which the parent would have taken, had he or she not have died in the life time of my daughters. But should it so happen that either of my daughters at the time of her death, should have no lawful issue or descendants of her body, to take her share of the estate agreeably to the above devise and bequests, (or should it so happen at the determination of her husband's life estate, as above given, in the event of surviving his wife,) no issue or descendant of such daughter should be alive to take the moiety of such my daughter, according to the intent of this my will, then I do devise the share and portion of such deceased daughter, to her sister, my other daughter, if living, to be held by her, in all respects, as her own proper portion is given in this my will, to be held and subject to the like limitations. And if such, the other sister, be not then living, then such share or portion to go to and amongst her children in the same manner as her own moiety is to go under this my will."

There is no disposition of the estate in the event of both daughters dying without leaving issue. The complainants, Mrs. Alicia H. Middleton and Mrs. Sarah Dehon, are the daughters of the testator and his heirs at law.—The husbands of both these complainants are dead—each has three children living. After the death of the testator, and of his widow who survived him, and died in 1832, a partition was made between Arthur Middleton (then living) and wife of one part, and Mrs. Sarah Dehon of the other part, by which a lot of land with a three story wooden house upon it, on the west side of East-Bay, was allotted to the former ; and a lot with a three story brick house thereon, on the south side of Tradd-street, and another adjoining lot with a two story wooden house thereon, were allotted to the latter. This partition was confirmed by a decree of this court ; the property to be held by the parties subject to the limitations of the testator's will.

On the 11th January, 1836, Arthur Middleton entered into a contract to sell the premises allotted to him, to the defendant, George Kinloch, for the price of \$8500 ; which amount was paid and the possession delivered.—Arthur Middleton, on his part, entered into a bond, with security, in the

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penal sum of \$10,000, conditioned to make good and sufficient titles to the said George Kinloch.

The complainant, Alicia H. Middleton, and the other complainants, Nathaniel Russell Middleton and Ralph Izard Middleton, are the executrix and executors of Arthur Middleton.

On the 27th April, 1836, complainant Sarah Dehon contracted to sell the two lots and premises allotted to her, to the defendant, John Redfern, at the price of \$7050: one-third to be paid in cash and the balance in several annual instalments, to be secured by bond and mortgage of the premises. This complainant also executed her bond, conditioned to make good and sufficient title; the cash part of the purchase money was paid and possession of the premises given.

The complainants, Alicia H. Middleton and Sarah Dehon, respectively proposed, (the former in execution of her testator's contract, the latter of her own,) each to execute a deed of feoffment with livery of seisin, to the said George Kinloch and John Redfern, for the premises purchased by them respectively, together with a release of right of entry or action from the other, as heir at law of the testator, Nathaniel Russell: the effect of which, it was supposed, would be to bar contingent remainders to the children or grand-children of these complainants, and give a perfect title to the purchasers. These deeds were tendered, but the defendants refused to receive them, under the impression that they did not convey a perfect title. The bills are for specific performance, and the only question is, whether the titles tendered were such as the defendants were bound to accept.

There can be no question but that the limitations by the will of Nathaniel Russell to the children or grand-children of his daughters, constituted contingent remainders. They were to the children who should be living at the death of the daughters respectively, or to the children of those who should have died leaving children: until the death of the daughters, it must remain perfectly uncertain who will be the persons to take; and this is the definition of one species of contingent remainders. There is no pretence to construe them executory devises. But, on this point, I understand the parties to agree. Then there can be as little doubt, but that, according to the English law, (at all events as formerly existing,) a feoffment by tenant for life of a legal estate, has the effect of barring all contingent remainders depending on that life estate. Such was the determination in Archer's case, (1 Co. 66,) which has been followed without question ever since. See also Butler's Fearne, Cont. Rem. 6 v. p. 316, et seq. It is true that where the tenant for life is only a *cestui que trust*, he cannot forfeit or bar a remainder by a feoffment, the legal estate being in the trustee: though, in this case, it is said he may, by suffering a recovery.—Fearne 321, referring to Parker v. Harrell, 2 Fearne, 213. It is on account of this liability of contingent remainders to be destroyed by the act of the tenant for life, that the practice has obtained of creating trustees to support contingent remainders.—2 Blac. Com. 171-2. And though it is said that the mode of conveyance by feoff-

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ment is now little in use in England, being in a great degree superseded by the conveyance by lease and release, yet I have not found it suggested by any authority whatever, that the former mode would not now be valid and effectual, and have every legal effect that ever it had.

Then it is argued that it ought to be regarded as obsolete from long disuse in this State. But it seems to have been repeatedly recognized by the legislature. By the act of 1731, (P. L. 131, 1 Br. Dig. 170,) it is provided that no deed of feoffment shall be impeached for want of livery of seisin, and enrolment thereof. By the act of 1785 (P. L. 382, Br. Dig. 172,) providing for the recording of deeds, it is provided that in deeds of feoffment, the memorandum of livery of seisin shall be acknowledged or proved and recorded. And by the act of 1795, (2 Faust. 4, 1 Br. Dig. 176,) authorizing a particular form of conveyance, it is provided that it shall not be held to invalidate the forms heretofore in use in this State. Then how I am to regard it as obsolete since that time? Acts of the legislature have some time been regarded as obsolete, or presumed to be repealed where a practice has long obtained *contrary* to their provisions, evidenced by the decisions of courts, by which the rights of parties have been fixed, which it would be mischievous to unsettle: or however plain the terms of the act may appear to us, we suppose that the courts, by whose decisions we are bound, have given it an opposite construction.

But I am not aware that we can regard any law as obsolete, merely because for a long time no case has arisen under it: nor can I conjecture what length of time would be necessary to have the effect. Such seemed to be the view of the Court of King's Bench in the case of the appeal of murder and claim of trial by battel.

In point of fact, however, memoranda of such conveyances of very late date were produced to me from the Register of Mesne Conveyances.

Then it is argued, that although the effect of a feoffment may be to bar a contingent remainder, when the remainder-man is an adult, yet it is nowhere said that it can have the effect to bar an infant. And the act of 1824, saving the rights of infants from the effect of the statute of limitations, was referred to—I suppose to show the general bearing of the law in favor of infants. It may be observed that if the remainder be contingent, it is unknown whether the remainder-man will be an infant or an adult. But the whole of the argument is founded on an inattention to the grounds of the law on the subject. By alienating in this manner, the tenant for life *forfeits* his estate. For this, two reasons are assigned by Blackstone, (2 Com. 274-5). First, that it is a renunciation of the feudal duties; and, secondly, that his own act has determined his entire interest. The infancy of the remainder-man can have nothing to do in saving this forfeiture, incurred by the tenant for life on account of his wrongful act. Then the rule comes in, that a contingent remainder must take effect the instant that the preceding estate determines, or it is gone forever. And certainly this rule is not modified by the circumstance that the remainder-man is an infant, or an adult. On the

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determination of the estate of tenant for life, Blackstone adds: "The next taker is entitled to enter regularly, as in his remainder or reversion." But in this case, the complainants themselves are the heirs at law of the testator, and there being no vested remainder limited, the inheritance must be in them by reversion. They are themselves then, the only persons entitled to enter for the forfeiture, and the feoffment of one, with the release of the right of entry, and action by the other, must convey a perfect title to the feoffee—or if both should join in the feoffment, this would bar them of any possible right in the land.—Editor's note to 2 Thos. Co. Lit. 354.

The subject of greatest doubt to me is, whether, although the feoffment, if accepted, would at law convey a good title to the feoffee, yet would a court of equity aid the complainants to defeat the contingent remainders, by compelling the defendants to accept? When there are trustees to support contingent remainders, and they join in conveying the estate so as to defeat the remainders, the court will, in general, punish them by making them personally liable. Will it then aid the tenants of the legal estate to do the same thing, when there are no trustees? In the case of *Roche v. Kidd*, (5 Ves. 647,) the chancellor plainly intimates his opinion, that the court would not compel a purchaser to take such a title. Yet, even in that case, where the question was, whether the limitations were contingent remainders or executory devises, the chancellor said that if the defendants were willing, he would send a case to law for its determination, of course with a view to decree a performance, if they should be found to be contingent remainders which might be defeated. In this case, I do not understand the defendants to resist the performance, provided they can be assured of a good title, but to desire the opinion of the court upon it.

It is not according to our practice to send cases to the courts of law. I feel some reluctance to turn the parties round to a farther litigation, when I suppose them on both sides to desire a termination of it by the judgment of this court. Indeed, it seems to be for the advantage of the defendants that this should be done.

In the last case stated, he has paid the whole of the purchase money without receiving a title. If the views I have taken be correct, that the title tendered would be good and perfect at law, then certainly he could not sustain an action to recover back the money, nor, in either case, any action on the bond conditioned to make title. Mrs. Middleton, indeed, seems to require no aid of this court.

The last objection is to the want of parties. This must proceed upon the general rule, that every person having an interest in the subject of the suit ought to be made a party. And it is supposed that the persons entitled under the limitations, upon the deaths of the complainants, have such interest.

I take the rule to be as laid down by Lord Redesdale, in *Gifford v. Hort*, (1 Sch. & Lef. 408,) "that it is sufficient to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life."

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The complainants, who are the tenants for life, are also, according to the view I have taken, the only persons entitled to the inheritance.

It is said by Lord Eldon, in *Cockburn v. Thompson*, (16 Ves. 326,) that "it has been held sufficient to bring before the court, the first person having an estate of inheritance; though it cannot be denied that persons having present, immediate, valuable interests in the same real estate, may become most deeply affected by what is done in their absence." So, by Lord Hardwicke, in *Pinch v. Finch*, (2 Ves. 493,) that it is necessary to bring before the Court the first person entitled to the remainder or inheritance, if in being; "if none in whom the inheritance is *vested* in being, it is impossible to say the trust shall not be executed until a son is born," &c. See also *Reynoldson v. Parkinson*, (Amb. 564.) That was a bill to foreclose a mortgage of an estate, subject to contingent remainders, and objected that the remainder-man was not a party; which was held not to be necessary.—The chancellor speaks of the inconvenience, if the foreclosure were open to every contingent remainder-man. It was an exception to the rule of making parties all persons having an interest. No doubt, in this case, the remainder-men, whoever they may be, will be bound by the decree.

It is ordered and decreed, that upon the complainant, Sarah Dehon, executing to the defendant, John Redfern, a deed of feoffment, with livery of seisin of the premises contracted to be conveyed by her to him, with a release of the right of entry and action by the other complainant, Alicia H. Middleton; or if both the said complainants shall join in such feoffment, the said defendant accept such title: that he pay any instalment of the purchase money or interest thereon which may be now due, and execute to the said complainants his bond, with a mortgage of the premises for the purpose of securing the other instalments, in pursuance of the terms of his contract: and that upon the complainant, Alicia H. Middleton's executing to the defendant, George Kinloch, a similar title for the premises contracted to be conveyed to him, he accept such title. Parties to pay their own costs.

From this decree the defendants appealed, on the ground that the titles tendered by complainants were not such as they were bound by law to accept; that the form of conveyance by deed of feoffment is obsolete in this State; and that since the act of 1824, the rights of minors claiming contingent remainders would not be barred or defeated by deed of feoffment.

H. A. Desaussure, for appellants.

Petigru & Lesesne, for complainants.

HARPER, Ch. The court concurs with the chancellor on the reasoning used, that the effect of the conveyance by the feoffment with the release of the right of entry, will be to bar the contingent remainders at law and give a good title. But a majority of the court is of opinion, according to the intimation of Lord Eldon, in *Roach v. Kidd*, and the general doctrine of this court, that it ought not to interfere to aid the tenants for life in defeating the

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remainders, or compel the vendees to accept such titles ; and it is not perceived that any inconvenience can be sustained by the parties from this determination. One of the complainants has received the purchase money and needs no aid—the other has received part of the purchase money, and can only be required to execute title upon receiving the bond and mortgage stipulated by her contract. Though titles have been tendered and refused, yet the defendants may again demand them ; and if they should be refused on the part of complainants, may sustain actions at law on their bonds for title.

It is ordered and decreed, that the decree be reversed, and the bills in both cases dismissed.

JOHNSON, Ch. I concur in the order dismissing the complainants bills.—I wish to be understood, however, as reserving the question whether the remainder-men can be barred by feoffment and livery of seisin.

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ACTION ON THE CASE.

1. In an action of malicious prosecution, the declaration charged "that the defendant contriving and maliciously intending to injure the plaintiff, &c., procured *one F. C. Ruff* to appear before the defendant, a justice of the peace, and falsely and maliciously, and without any reasonable or probable cause whatever, to make oath," &c. HELD sufficient, after verdict for the plaintiff, on a motion in arrest of judgment. *Perdu v. Connerly.* 48.
2. In the above allegation, the act done by *Ruff* is charged to have been false and malicious, and without probable cause, and to have been *procured* to be thus done by the defendant maliciously. The defendant is liable for *Ruff's* act as done by his *procurement*. *Ibid.*
3. If it were necessary in this case to allege that the defendant knew that *Ruff* had no reasonable or probable cause for the charge, this is in effect charged when the defendant is charged with having of his malice procured a *false* and groundless charge to be made, and if defective, is aided after verdict. *Ibid.*
4. The general rule of pleading is, that all the circumstances necessary for the support of the action should be stated in the declaration; and in an action against one for instituting a groundless and malicious prosecution, through the *agency* of a third person, the averments 1st, of the *agency* of the defendant in causing such third person to make a false charge; 2d, the charge thus made; 3d, the arrest of the defendant, his commitment or enlargement on bail to answer the charge; 4th, the presentation of the bill to the grand jury and their action upon it; and 5th, the discharge of the plaintiff, and that the prosecution was thus ended, are all that are necessary, and are sufficient. *Ibid.*
5. In an action on the *case* against several joint defendants, the plaintiff may, it seems, generally recover on proof of a sufficient cause of action against *one*, and the joinder of too many defendants, furnishes no objection to such action or a recovery. But the rule is otherwise in *assumpsit*, and is perhaps questionable when applied to an action on the *case ex quasi contractu*. The case of *Govett v. Radnidge et al.* 3, East., 68, and the subsequent cases on this subject, commented

ACTION ON THE CASE.

on by the court. The result of the later authorities would seem to show that in actions on the case *ex quasi contractu*, (as well as of *assumpsit*) against several defendants, the plaintiff must show a *joint* liability of all the defendants or he must fail. *Patton's adm'rs v. Magrath & Brooks*. 162.

6. Action for malicious prosecution—verdict for plaintiff—motion in arrest of judgment. The declaration set out, “that the defendant falsely, maliciously and without any reasonable or probable cause, made the information, charging the plaintiff with the commission of perjury; the issuing of the warrant, the arrest, imprisonment and enlargement of the plaintiff, on his recognizance to appear at the next Court of Sessions for Pickens district, to answer the said charge,” and then states, “that on the 9th of October, 1837, the defendant not having any proof whereby to sustain the said charge made by him against the said plaintiff, the prosecution for the supposed offence aforesaid failed, and the said plaintiff was fully and freely discharged by *the said court*, and then, as now, the said prosecution for the said supposed offence was, and is, wholly at an end.” Held sufficient, and the motion refused. *Sitton v. Farr*. 303.
7. The omission to state the fact specially, that the bill of indictment went to the grand jury, and that they ignored it, is immaterial, for, legally speaking, until the grand jury find the indictment, it is as if none had existed. The fact, in this respect, is sufficiently stated, by setting out that “the defendant not having any proof whereby to sustain the said indictment,” &c., for the “no bill,” by the grand jury is, in fact, saying there was no proof to sustain the charge. *Ibid*.

See *WAY*, 1.

ADMINISTRATION. See **ORDINARY**.

ADMINISTRATORS. See **EXECUTORS and ADMINISTRATORS**.

ADVERSE POSSESSION. See **TRESPASS TO TRY TITLE**.

AFFIDAVIT. See **TROVER**, 7.

AGENT, See **PRINCIPAL and AGENT**.

AGREEMENT.

1. Defendants executed, and delivered to the plaintiff, the following paper: “I promise and agree to execute a good and legal mortgage to A. W. Thompson for any piece of land he may wish, that will be sufficient to pay him a debt of one hundred and fifty dollars, which we owe him, for defending a case in the Court of Equity, James Tollison against us. Given under our hands and seals, this 12th

AGREEMENT.

April, 1828. It shall be as much as one hundred and fifty acres and no more, except we wish it." S. Crocker, one of the defendants, subsequently, did execute a mortgage to the plaintiff, which was accepted by him. HELD, that according to the true construction of the instrument, it was an acknowledgement of a debt due by *both*, with an agreement that *one* of them should give a specific lien, by mortgage, to secure the payment; and, that, notwithstanding the delivery of the mortgage, the debt remained the debt of *both*, and that the action would lie against both. Nonsuit granted below set aside. *Thompson v. S. & W. Crocker.* 23.

2. The *old rule* was, that a party could not stultify himself; but it is now subject to many modifications, and it may now generally be stated, that if a party sought to be charged with a contract, can show that he was so devoid of capacity as to be utterly incapable of understanding it, he is not bound by it. *M'Creight v. Aiken.* 56.
3. (Sed quære. If a lunatic may not be bound by his contract for *necessaries*, in the same way as an infant, where no advantage has been taken of him? See Chitty on Cont. 108.

AMENDMENT.

Amendments should in general be allowed where they do not operate to delay or prejudice the other party, but even then it is not usual to allow them on the trial of a cause, except in cases of surprise or accident. Nothing of that kind being pretended in this case, the motion to amend was properly refused. *Southerlin et al. v. M'Kinney et al.* 35.

ANCIENT DEED. See EVIDENCE, 6. TRESPASS TO TRY TITLE, 8, 9.

ANDERSON TOWN OF.

By the act of incorporation of Anderson, power is given "to the Town-Council to impose fines for the violation of their Ordinances, and, if for less than \$20, to try the offender." The plaintiff was alleged to have committed a breach of an ordinance, by exhibiting certain *shows*. For this, he was summoned before the council and fined. He paid the fines, and brought an action, before a magistrate, to recover them back. HELD, that if the "Council" had not jurisdiction of the subject, the plaintiff's remedy was by *prohibition*; and, that after paying the fines imposed, an action to recover the money back would not lie; and, that if they had jurisdiction of the subject, their judgment was *final*. *M'Kee v. Town Council of Anderson.* 24.

APPEALS AND COURT OF APPEALS.

1. On an appeal to the Court of Common Pleas, from the decision of a Court of Ordinary establishing a will, the correct practice is, for the

APPEALS AND COURT OF APPEALS.

appellants to file a suggestion setting forth the proceedings in the Ordinary's Court, and then to assign, specifically, the supposed errors in the judgment of that court. *Southerlin et al. v. M'Kinney et al.* 35.

2. In such a case, the appellants, who are regarded as the *actors* and the affirmants of the truth of the issues before the court are bound to open the case and are entitled to the *reply* in evidence and argument. (S. P. Tillman et al. v. Hatcher. 271.) *Ibid.*
3. After an appeal from the verdict of a jury, upon a question of *fraud* before a commissioner of special bail, under the act of 1833, has been heard and decided in the Court of Appeals, and the prisoner has been directed to be discharged upon assigning his schedule and delivering to the assignee the property mentioned therein which has been in his power since his arrest, no *further appeal* lies to this court for any supposed error in the commissioner's discharge of this duty. *Graham ads. Beckner.* 44.
4. Before the act of 1833 no appeal lay under any circumstances from the decision of the commissioner of special bail. The legislature by that act have thought proper to give the right of appeal in a single instance, *that* of the finding of the jury upon questions of fraud and undue preference, or upon the allegation that the prisoner has gone beyond the prison rules. So far the jurisdiction of the commissioner of special bail has been divested of its exclusive character; in all other respects it remains unaltered. *Ibid.*
5. If the commissioner of special bail commits an error in matter of *law* in the final order of discharge, his error in that respect may be corrected by writ of *certiorari*. *Ibid.*
6. The appellants, from a decree of the ordinary, establishing a will and admitting it to probate, are entitled to open the case and to reply in evidence and argument, on the trial of the issues made up on the appeal, in the Court of Common Pleas. (S. P. Southerlin et al. v. M'Kinney et al. 35.) *Tillman et al. v. Hatcher.* 271.
7. The act of 1799 provides for the right of appeal from the ordinary to the Circuit Court, and is not limited to any specific classes of cases. The Circuit Courts are required to hear such appeals, "and all matters of fact shall be tried by a jury." There seems to be no sufficient reason for saying that the right of jury trial in such cases, shall be restricted solely to questions of *devisavit vel non*. *Jennings et al. v. Weeks.* 452.
8. The correct course of practice on appeals from the ordinary indicated. *Ibid.*

See ORDINARY. 12.

ARBITRATORS. See AWARD.

ARREST OF JUDGMENT. See ACTION ON THE CASE, 1, 6, 7. INDICTMENT, 6.

ASSAULT AND BATTERY. See PRACTICE, 1, 2, 3, 4, 5, 6.

ASSIGNMENT.

An assignment of the whole estate and effects of a debtor for the benefit of his creditors generally, though upon trusts, *preferring in the order of payment* one creditor to another, has been recognized in this State as valid and binding. (S. P. Niolin v. Douglass et al., 2 Hill. Ch. R., 443, 446.) *Smith, Wright & Co. v. C. C. Campbell & Co.* 352.

See INSOLVENT DEBTORS AND PRISON BOUNDS ACTS, 5, 6, 7, 8, 9.

ASSUMPSIT.

1. In an action of assumpsit by plaintiff as the guardian of two infants his wards, the counts in his declaration stated in substance that the defendant had received the money of the infants, and in consideration thereof had promised to pay the plaintiff, *their guardian*. HELD, that the plaintiff could only entitle himself to recover by showing, 1st, his guardianship; 2d, the receipt of the money by the defendant, and 3d, an *express* promise to pay the money to him, as *guardian*. *Brooks ads. Sullivan.* 41.
2. Where money has been received by another belonging to an infant, the promise to pay which the law *implies* on the part of the receiver, is *implied* to the *infant*, and not to the *guardian* of such infant. *Ibid.*
3. In an action of assumpsit for the price of two negro slaves, alleged to have been sold by the plaintiff to the defendant it appeared that the plaintiff had previously to the bringing of this suit, brought an action of trover against the defendant for the same negroes in which the jury had found a verdict for the defendant. The sale upon which the plaintiff relied in this case appeared to have been made before the action of trover was commenced. HELD, that the former recovery in trover by the defendant was no *bar* to this action, and the jury having found for the plaintiff, the court refused to grant a new trial. (Earle & Butler, J. dissenting.) *Robertson v. Montgomery.* 87.
4. The general principle in relation to the action of assumpsit for money had and received, is this, that if one has money in his hands which belongs to another person, that person may sue the receiver in this form of action and recover the amount from him. *Marvin v. M' Rae* (survivor.) 171.
5. Where there is a special contract still open and something remains to be done beside the payment of the money, the action must be on the special contract; but where all has been done on the part of the plaintiff, and he has nothing to do but to prove the payment of the money he may sue on the general count. *Ibid.*

ASSUMPSIT.

6. Mrs. G., a feme sole, employed one King as an agent to retain counsel for the prosecution of her claims to some lands in Georgia, and for the purpose of enabling him to do so, gave her note to the agent payable to himself or order. King afterwards sold the note to one Lawton, and Mrs. G. intermarried with one Clark, (her co-plaintiff in this action,) who demanded the money from the defendant. HELD, 1. That the defendant, by selling the note to Lawton, had turned it into money, and that as soon as he did this, it became money in his hands belonging to Mrs. C., to be applied to her use in carrying on her suit in Georgia. 2. That when her husband C. revoked the power originally conferred, and demanded the money from defendant, he was bound to pay it or account for the application of it. 3. That the plaintiffs were entitled to recover the amount on a count for *money had and received*. 4. That they were entitled to recover without proof on their part that the defendant had not employed counsel in pursuance of the agreement under which the note was given. Nonsuit ordered below, set aside. *Clark & wife v. King*. 178.
7. The vendor of a negro slave, though he sell as the *agent* merely of the owner, and without any express warranty, is liable to the purchaser upon the implied warranty of soundness, where he has received notice of the unsoundness, and the negro has been tendered back to him, before he has paid over the purchase money to his principal; and in such a case a count for *money had and received*, will be sufficient. *Parkerson v. Dinkins*. 185.

AUDITA QUERELA. See PRACTICE. 3.

AWARD.

1. That a case pending in court has been referred to arbitration by the mere agreement of the parties, *and not by a rule of court*, constitutes an insurmountable objection, if presented to the Circuit Court, against the *confirmation* of the award. *Parnell v. King et al.*; *Wilson v. Parnell*; *Same v. M'Kagin*. 376.
2. There were several cases pending in the Court of Common Pleas, to wit: an action of *trespass* in which *Carma Parnell* was plaintiff, and *W. W. King* and *John Yarbrough* defendants; an action of *assumpsit* in which *Samuel Wilson* was plaintiff, and said *Carma Parnell* defendant, and a *summary process* in trover, in which said *Samuel Wilson* was plaintiff, and *J. W. P. M'Kagin* defendant. By agreement among the respective parties to these suits, and under a rule of court, they were referred to arbitration; and as the result of the consideration of the arbitrators, of the matters submitted to them, they *awarded* that *Samuel Wilson* should pay to *Carma Parnell* the sum of two hundred and fifty-five dollars. HELD, that in the state of the pleadings in the cases, the award could not be confirmed. *Ibid*.

AWARD.

3. "Arbitrators are not bound by technical rules in the formation of an award;" but notwithstanding this is the case as to the arbitrators themselves, still the court cannot give effect to their award, as a judgment, if it violates the rules by which the court is governed in the rendition of its own judgments. *Ibid.*
4. The court could not render judgment for a sum of money in favor of a defendant against the plaintiff, unless upon a *discount*—and where in an action of assumpsit, the arbitrators awarded a sum of money to be paid by the plaintiff to the defendant, in which no discount was pleaded or set up, the court refused to confirm the *award*. *Ibid.*

BAIL AND BAIL BOND.

1. Where a defendant has once given bail to the action upon the original writ, and is surrendered by his bail to the sheriff, the sheriff has no authority, after the return of the writ, to let the defendant to bail a *second* time. *Chiswell (assignee) v. Ellzey; Same v. Cobb; Same v. Walker.* 29
2. By the Statute 23 Hen. VI., c. 9, the condition of a bail-bond must be, "that the defendant shall appear at the day contained in the writ;" and, if conditioned for his appearance at a day *after* the return of the writ, is void. *Ibid.*
3. The Stat. 43 Geo. III. c. 46, § 6, not being of force in this State, it may well be doubted, whether, after a surrender by bail, there is any power under our law which can again let the defendant to bail. If there is, it must be upon the defendant's entering into a recognizance of special bail, before some justice of the quorum, or clerk of the court, who, by the act of 1791, 1 Faust. 167, are constituted commissioners of special bail, and obtaining thereupon a judge's order for his discharge. *Ob. Dic., per O'NEALL, J. Ibid.*

See TROVER, 7

BAILMENT. See COMMON CARRIERS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. By a law of the State of Georgia, demand and notice are dispensed with, and indorsers and assignors of notes are made liable as securities. By the same act, the holder forfeits his remedy if he does not *sue in three months* after notice to do so. The defendants in this case, who were citizens of South-Carolina, bought a negro from the plaintiff, who resided in Georgia, and transferred by indorsement to the plaintiff, two notes of one J. J. Logan in payment. The contract was made in Georgia, but the plaintiff knew the defendants resided in South-Carolina. **HELD**, that the contract of indorsement in this case, was to be interpreted by the law of Georgia. *Holt v. Salmon & Stroud.* 91.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

2. Under the second section of the law of Georgia referred to, if the plaintiff does not sue within three months after notice to do so, the indorser is discharged. But it is not enough, *it would* seem, for the indorser in such a case to prove that he has given the plaintiff notice to sue, in order to discharge himself from the indorsement; the *burden rests* upon him to show also, that the plaintiff had neglected to sue for three months after notice. *Ibid.*
3. The declaration in this case set out the making of the note, the indorsement by defendants, demand and notice, and alleged that the defendants became liable to pay, &c. HELD sufficient in reference to the law of Georgia, which dispenses with demand and notice, and makes the liability of the indorser an absolute and not a conditional one. The allegation of demand and notice, though unnecessary, does not vitiate the declaration, and may be rejected as surplusage. *Ibid.*
4. Colin M'Rae (the defendant) and one George C. Brown, were merchants trading under the name of Colin M'Rae & Co. Brown advanced money to the firm and took their note payable to himself or order. Brown being indebted to the plaintiff (Marvin,) was arrested on a bail writ at his suit, and delivered the note to Cohen, the attorney of Marvin, and was thereupon discharged from the arrest. The note was not indorsed. Shortly afterwards and before the note was due, Cohen gave notice to M'Rae of the transfer of the note and of the circumstances under which he had received it. M'Rae replied, "that in the settlement of the concern of M'Rae & Co., he would retain money enough to pay the note." Cohen saw M'Rae frequently afterwards, and he repeatedly made the same promise. On the 17th of March, 1835, after the death of Brown, Cohen again applied to M'Rae for the money, and was informed by M'Rae that he had settled with Brown; that he told Brown, he (M'Rae) must retain money to pay this note; that Brown replied, never mind, allow me to take the money and I will pay the note," and that he permitted Brown to do so. HELD, that Marvin was entitled in an action for *money had and received*, against M'Rae as survivor, to recover the amount of the note. The nonsuit ordered by the court below set aside. *Marvin v. M'Rae*, (survivor). 171.
5. Though a *verbal* transfer of a note, payable to order, or its delivery to another by the payee without indorsement, conveys no right of action upon the note, against the maker, yet in all other respects the holder is as much the owner of the note, as if it had been indorsed, and he may sustain an action in the name of the payee and recover the money for his own use. *Ibid.*
6. The cases on this subject go upon this principle, that by the transfer, the holder is the agent of the payee to receive the money, and that this agency is coupled with a trust which is irrevocable. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

7. Action on a note against the indorser—question of diligence. The note was payable at sixty days, and fell due on the 23rd and *payable* on the 25th of May, 1837. On the 22d or 23d of May, the maker and his whole family were drowned near Sullivan's Island, and were buried on the 24th. The indorser had been on terms of intimacy with the maker and attended his funeral. On the 25th, notice of non-payment was given to the indorser. The maker, as far as it appeared on the trial, left no will; and up to the time of notice, no administration had been, or indeed could have been taken out on his estate. **Held**, that all due diligence had been used under the circumstances, and that a formal demand at the *late* dwelling of the deceased and family, (then unoccupied and deserted,) would have been worse than useless, and any other, impracticable or unnecessary.—(RICHARDSON, J., dissenting.) *Haslett v. Kunhardt*. 189.
8. Action against an indorser—question of diligence. The note was drawn by one Pohl and wife, dated 12th February, 1838, payable at three months after date, to the defendant or order, and by him indorsed. It fell due on the 12th and *payable* on the 15th of May.—The testimony was that the plaintiff, the holder of the note, resided at *Montgomery*, Alabama, both at the date of the note and up to the time it was payable. That one *George Timmons* acted as her agent in the city of Charleston, where the note was given, and where the drawers and indorser also resided. The note was taken by *Timmons*, for the rent of a house in Charleston, belonging to the estate of *Duggan*. *Timmons* was taken sick a little more than a month before the note became due, and died on the 11th of May. The papers of the estate of *Duggan* were kept by *Timmons*, in his desk at the *Union Bank*, in which he was collection clerk and notary, and were delivered to one *O. L. Dobson*, (who was acting for Mrs. *Timmons*, executrix of *Timmons*,) by the officers of the bank, on the 8th of June. There was no knowledge that the note was there until the 8th of June, either by Mrs. *Timmons* or *Dobson*. *Dobson* was a notary public: he immediately made a demand on the drawers, and the note not being paid, protested it, and gave notice of non-payment to the defendant as indorser. **Held**, under the circumstances, that due diligence had been used, and that the defendant was liable. *Duggan v. King*. 239.
9. Quere.—Whether the question of reasonable diligence, in making demand and giving notice, in the case of bills and notes, be one of law for the court, arising upon the facts ascertained, or a mixed question of law and fact, to be left under the instruction of the court as to the law, exclusively to the jury? *Ibid*.
10. On a note payable on demand, the maker is bound to pay immediately, and is not entitled to days of grace. The holder may sue on the same day the note is made. Any other demand than by suit is unnecessary. *Smith v. Bythewood*. 245.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

11. Whenever the plaintiff may sue the defendant, a cause of action may be said to *have accrued* to him, and from that time the statute of limitations begins to run ; consequently, upon a note payable on demand, the statute commences from the date, if it have one, and if without date, from its *delivery*. *Ibid*.
12. John Howard, the defendant's intestate, shortly before his death, with a view to a partial disposition of his effects and making some provision for the plaintiff, who had married his natural daughter, executed and delivered to the plaintiff the following note : "At my death, I promise to pay, or cause my administrators or executors to pay, to William Hall, or to his heirs, the sum of five hundred dollars, for value received ; witness my hand and seal, this 12th January, 1837." The note was signed in the presence of two witnesses, who subscribed their names as witnesses to the note. **HELD**, that as a promissory note it was without consideration, a mere naked revocable promise, and void. *Hall v. Adm'rs. of Howard*. 310.
13. Where a bill drawn by the defendant on the plaintiff's intestate, payable to a third person or order, and indorsed by the payee with a receipt of payment on the back of the bill by another person, was in the possession of the drawee, **HELD** that the presumption of payment arising from the possession of the bill was insufficient, without proof that the receipt was in the hand writing of a person entitled to demand payment, or other sufficient evidence of payment aliunde.—*Spann v. Ballard*. 440.

See **CONDITION**, 1. **EVIDENCE**, 11. **GIFT**, 1, 2, 3.

BOND. See **BAIL BOND**.

CERTIORARI. See **INSOLVENT DEBTORS AND PRISON BOUNDS ACTS**, 3.

COMMISSIONER OF SPECIAL BAIL. See **INSOLVENT DEBTORS AND PRISON BOUNDS ACTS**.

COMMON CARRIERS.

1. These were several actions of assumpsit against the defendants, owners of the "Steamer Atalanta," for the value of certain goods shipped by the respective plaintiffs, and alleged to have been lost, on board the said steamer, plying on the Pedee River, between Georgetown and Cheraw. The defence set up was, that the "Atalanta" sunk by running on a concealed and unknown snag, in the ordinary boat channel, when the river was fairly navigable for steamboats ; and that the loss which followed was not in consequence of any want of prudence and diligence on the part of the master and owners. There was a great deal of testimony offered on both sides ; by the defen-

COMMON CARRIERS.

dants to sustain, and by the plaintiffs to repel, the grounds of excuse set up: and in some respects, the evidence was conflicting and contradictory. The plaintiffs insisted especially that the defendants had been guilty of negligence after the steamer struck and went down, in not rescuing the goods and forwarding them to their destination. Upon this part of the case, his honor, the presiding judge, charged the jury—"that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged; but that they might be held liable for damages, arising from want of diligence and proper exertions towards saving and delivering the goods on board; and that the jury might regard as a proper standard of such diligence, such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property, similarly situated." The jury found for the defendants, and a motion for new trial was refused. [RICHARDSON, J., dissenting.] *Faulkner & Carns v. Wright, Coker & Tuttle; Williamson & Dunlap v. the same; A. & W. Dunlap v. the same; J. A. & W. Carns v. the same.* 107.

2. The general principle is, that the master and owners of boats, on inland navigable rivers, like those of vessels at sea, are *common carriers*; that they are bailees for hire, and bound by the obligations of the law, to deliver goods placed on board their vessel at the place of their destination; unless they are prevented from so doing by the *act of God, or public enemies.* *Ibid.*
3. The bill of lading is the usual evidence of the contract between the owners of the vessel and the freighters. It is a contract, signed by the master for the owners, and subjects them to all the liabilities incident to it. As soon as the goods are taken on board, the owners become insurers to a certain extent; and the only causes which will excuse them for the non-delivery of the goods must be events falling within the meaning of one of the expressions, "the act of God," and public enemies," unless the contract be specifically qualified and limited. The *perils* usually excepted, and for losses arising from which they are not liable, are those which do not happen by the intervention of man, nor are to be prevented by human prudence; and *losses* arising from them are such as happen in spite of human exertion.—*Ibid.*
4. It has been decided in this state, that a boat running on an *unknown* and concealed snag, in the regular boat channel of a navigable river, may fall within the excepted perils.—[*Smyrl v. Niolon*, 2 Bail. Rep. 421.] *Ibid.*
5. The most usual contest in cases of *wreck* is, whether the losses from it are to be attributable to the negligence of the master, or are to be regarded as resulting from inevitable accident. When the wreck is inevitable, and a total loss is the immediate consequence, there is

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little difficulty in applying the general principle of law. In such a case, the master would be absolved from all responsibility. When, however, the injury, in the first instance, happens from the act of God, as by the stranding of a vessel, and after some interval of time, a loss either partial or total, is the ultimate consequence, there is much greater difficulty in deciding on the rights and liabilities of the parties concerned. The conduct of the master or owner then becomes a subject of important consideration. If they be guilty of negligence, they will be held answerable for all the damages which proceed from it. Their duty is, to use all the means within their power and control to arrest and obviate the consequences of the disaster; and there is perhaps no better rule than that they should be bound to use such *care* and attention as a prudent man would have done in a similar situation, with regard to his own property. *Ibid.*

6. Their duty is to deliver the goods as they were left by the wreck; if not in a sound, in their damaged state. What will excuse them must necessarily depend upon the circumstances peculiar to each case; and in a great measure must be a matter of fact to be submitted to the jury. When all reasonable efforts fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the *first* cause, as the *vis major*; upon the ground that when human exertions have failed to obviate its consequences, the "act of God" may still be regarded as continuing its operation. *Ibid.*
7. In an action of *assumpsit*, the declaration counted upon a joint contract by the defendants, to carry 14 bales of cotton for freight from Hamburg to Charleston, in the steamboat *Augusta*, of which the defendant Magrath was owner, and the other defendant Brooks, master; and alleged a loss of the cotton by negligence. The evidence of the contract was a bill of lading for the cotton shipped on board the *Augusta*, signed by the defendant Brooks, the master only. **Held**, that the contract was several and not joint, and that the defendants were improperly joined. New trial ordered, and that at the hearing of the case below, the plaintiffs would be obliged to be nonsuited. *Patton's Adm'r. and Adm'r. v. Magrath & Brooks.* 162.
8. The *master* of a vessel, as well as the *owner*, is liable to the merchant or shipper of goods, for damages, in case of injury to the goods or their loss. But their liability is *several* and *distinct*. The *master* is liable precisely to the same extent, and in the same form of action, as the owner; but he is liable in a different character and on a different ground. Where he has no property in the vessel, and has only the conduct and management, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship and of the profit which they derive from it, by the receipt of the freight money. The master is also liable on his own contract for the transportation of the goods, and by virtue of his taking charge of them for that purpose. The liability of the *owners*

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is *implied* by law, from the nature of the employment, on the ground of public policy. The liability of the *master* seems rather to be by *express* undertaking, and although he is not owner and receives no part of the freight, yet, on the same ground of public policy and in favor of commerce, he is made personally responsible on his undertaking, even where the owners are known, which is thus far a departure from the general law of principal and agent. *Ibid.*

9. In an action on the *case* against several joint defendants, the plaintiff may, *it seems*, recover on proof of a sufficient cause of action against *one*, and the joinder of too many defendants furnishes no objection to such action, or a recovery. But the rule is otherwise in *assumpsit*, and is perhaps questionable when applied to an action on the *case ex quasi contractu*. The case of *Govett v. Radnidge et al.*, 3 East. 63, and the subsequent cases on this subject commented on by the court. The result of the later authorities would seem to show, that in actions on the *case ex quasi contractu*, as well as of *assumpsit*, against several defendants, the plaintiff must show a joint liability of all, or he will fail. *Ibid.*
10. In this action, whether the declaration be considered as strictly a declaration in *assumpsit*, or as a declaration in *case ex quasi contractu*, the general and well settled rules of pleading and evidence will apply. The plaintiff must sue all the joint contracting parties, or the defendants may plead in abatement. He *must* sue in the same action *only* the joint contracting parties, or he will fail at the trial. *Ibid.*
11. Although the master and owner of a vessel are both liable to the merchant, as carriers, for the loss of goods, yet they are liable *severally*, and a *joint* action cannot be maintained against them. *Ibid.*
12. The plaintiffs delivered two hundred and fifty bales of cotton to one Hawkins, as a common carrier, to be delivered by him to Boyce & Co., (the consignees). The defendant, as agent of Hawkins, delivered two hundred and forty-three bales, but detained the remaining seven *for freight*, and refused to deliver them. Plaintiffs brought an action of trover against the defendant for the seven bales, and on the trial offered to prove that the cotton shipped was damaged, *by the default of the carrier*, to an amount exceeding the value of the freight. The judge below overruled the evidence and nonsuited the plaintiffs. Nonsuit set aside and new trial awarded. (EABLE and RICHARDSON, Justices, dissenting.) *D. & J. Ewart v. Kerr.* 203.
13. Under the English law of set-off, in an action by the carrier for freight, where goods have been delivered (though in a damaged condition,) and accepted, the defendant cannot set up a defence by way of discount or set-off, that the goods were damaged; for their statutes of set-off only apply to *liquidated* demands, and not to uncertain or unascertained damages. The freighter in such a case is put to his cross action. *Ibid.*

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14. Yet, under the discount act of this State, (P. L. 246,) which uses the terms, "any accompt, reckoning, demand, cause or thing against the plaintiff," the damages sustained by goods in their transportation, may, in all cases, whether the freight be agreed upon by the parties or not, be set up as a defence to the action by the carrier for his freight; and if such damages are equal to, or exceed the freight, the defendant must recover: and in this point of view, the defence becomes essentially a cross action. *Ibid.*
15. Under the law of this State, the carrier's right of lien for freight is only co-extensive with his legal right of action; if his claim to recover in the particular case could not be gainsayed, then it would follow that his *lien* could not be disputed. But as the owner may show in avoidance of his claim to recover freight, that the goods were injured in the transportation, it follows that his *lien* must be liable to be defeated in the same way. *Ibid.*
16. "Where there is no debt, there is no lien;" and if it can be shown that the carrier has injured the goods of the shippers to a greater amount than his whole freight, it cannot be pretended that they owe him any thing: and hence, the owner may maintain trover against the carrier for the goods which he detains, on account of his supposed claim to freight, and refuses to deliver. *Ibid.*
17. To maintain trover, it is only necessary for the plaintiff to show a right of property and of possession in himself, and a conversion by the defendant. All which being shown by the plaintiffs in this case, in the opinion of a majority of the court, it was HELD, the action was well brought. EARLE and RICHARDSON, Justices, (dissenting,) were of opinion that the carrier's lien for freight, entitles him to retain possession of the goods until his freight be paid: that he has a special property in the goods, which can only be divested by payment of the freight, or tender of it, and that being in actual possession, he is not liable in trover, however else he may be liable, or to whatever extent, for any damages which the goods may have sustained. That according to all the English cases, where the goods are delivered and accepted, in whole or in part (though damaged,) the freighter cannot set up the damages as a defence, or by way of discount, to an action for the freight, but is put to his cross action. That although it might be admitted, that under the terms of our discount act, the freighter may set up the damages by way of defence or discount to an action for the freight, yet that the defendant in this case, by delivering the principal part of the goods to the consignees, which they had accepted, was entitled to his freight, and had a right to retain the balance until the freight was paid or tendered; and that trover would not lie against him. *Ibid.*
18. Defendant was the owner of a boat, in which he was accustomed to carry his *own* cotton to Charleston; and occasionally, when he had

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not a load of his own, to take for his neighbors, they paying freight for the same. One *Howzer* was the master or *patroon* of the boat, and the *general* habit was for those who wished to send their cotton by the defendant's boat, to apply to the defendant *himself*. On this occasion, the patroon had been told to take Col. Goodwin's and Mr. Dallas' cotton, which he had done, when the plaintiff applied to *Howzer*, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant *himself*, to which *Howzer* replied he thought not, and received the cotton: **HELD**, that under the circumstances, the defendant was bound by the act of *Howzer*, as being within the general scope of the authority conferred upon him by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common carrier, for any loss of, or damage to plaintiff's cotton.—*M'Clure v. Richardson*. 215.

CONDITION.

Jones, the defendant, purchased a tract of land of Guthrie, the plaintiff, for which he gave two sealed notes for \$50 each, one payable on the 25th of December, 1836, the other on the 25th of December, 1837. The plaintiff by a separate instrument in the form of a bond, covenanted and agreed with the defendant "to make him a good and lawful title to the land *if the notes were paid*." **HELD**, that until the actual payment of the notes, the plaintiff was not bound to make titles to the land, and that his failure to do so in the meantime, furnished no ground of defence to an action on either note. *Guthrie v. Jones*.—444.

See "SALE OF LANDS AND CHATTELS," 6, 7.

CONSTITUTION OF THE STATE AND OF THE U. STATES.

1. The 35 § of the act of 1835, (acts of 1835, p. 54,) incorporating the Louisville, Cincinnati and Charleston Rail Road Company, provides, "that where any lands or right of way may be required by the said company, for the purpose of constructing their road, and for want of *agreement* as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, *the same may be taken* at a valuation to be made by commissioners," &c. **HELD**, to be constitutional. *The Louisville, Cincinnati & Charleston Rail Road Company v. Chappell*. *Same v. Reese*. 383.
2. All the writers upon the fundamental principles of national societies agree, and it has now become a principle of universal law, that *private property*, whether real or personal, may be taken for *public use*, upon just compensation to the owner. This doctrine has been uniformly recognised in this State. See the cases of *Lindsay v. Com'rs*, 2 Bay, 38; *Ford v. Whitaker*, 1 N. & M'Cord, 5; *M'Gowen v. Starke*, 1 N. & M'Cord, 387; *Com'rs v. Singleton*, 2 N. & M'Cord,

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528 ; *Eaves v. Terry*, 4 M'Cord, 125 ; and *State v. Dawson*, Riley's Coll., 103. *Ibid.*

3. The exercise of such a power belongs to the *eminent domain* of the State, and it devolves upon the legislature to decide in regard to great works of improvement, whether the public benefit is of sufficient importance to justify the exercise of the *eminent domain* in such cases. *Ibid.*
4. And the only restriction is, that private property cannot be *taken* without just compensation to the owner. *Ibid.*
5. *The exercise of this power* in relation to the Louisville, Cincinnati and Charleston Rail Road, is to be found in the authority conferred in the *charter* upon the company to lay out and construct a road between the given *termini* : and in the actual construction of the road the company are to be considered *so far* the mere authorised agents of the State, to execute the power conferred. *Ibid.*
6. The Louisville, Cincinnati and Charleston Rail Road is to be considered as a *great public improvement*, and when made, a *public highway*, and the legislature may appropriate *private property* for such improvement, or authorise a corporation *thus* to appropriate it, upon full compensation to the owner. *Ibid.*
7. The 37th clause of the act of incorporation, provides a full and ample mode of compensation to the land owner, for any loss or damage he may sustain by the company, in taking his property, in which the trial by jury is preserved, and which constitutes the proper tribunal for the decision of such questions. *Ibid.*
8. A State court has no jurisdiction over the offence of stealing a letter from the mail in violation of the act of Congress of 1825, regulating the post office department. (The case of *The State v. Wells*, 2 Hill, 687 *contra* overruled.) *The State v. M'Bride*. 400.
- 9 By the constitution of the United States as well as upon general principles of law, a criminal offence arising under and created by an act of Congress is *punishable only* in the courts of the U. States. *Ibid.*
10. An act of Congress conferring jurisdiction in such a case upon the State courts, is unconstitutional and void. *Ibid.*

CONTINGENT REMAINDER. See REMAINDER.

CORPORATION. See ANDERSON. MOULTRIEVILLE. LOUISVILLE, CINCINNATI & CHARLESTON RAIL ROAD COMPANY.

COSTS. See SHERIFF, 1, 2, 3.

COURTS, (STATE.) See JURISDICTION, 10, 11, 12.

COURTS OF THE UNITED STATES. See JURISDICTION, 10, 11, 12.

COVENANT.

1. Action of covenant. The defendants were contractors to embank a part of the rail road near Blackville ; they hired from the plaintiff ten slaves to work thereon, and by their covenant agreed "*not to expose the slaves to rain or other bad weather, or dangers of any kind.*" The defendants also stipulated by their covenant that they would not require the slaves to labor before daylight or after dark. The slaves worked one month, and in February, a day or two before the expiration of the month, the slaves of the plaintiff were discharged from work between sundown and dark. To reach their encampment they had to go around a pond through which the rail road ran at an elevation of about fourteen feet. The defendants' *overseer* said that the defendants had directed him to send the negroes always around the pond and not to suffer them to go through on the rail road. At different times, however, (this witness said,) when they were discharged before night, they had gone through the pond on the rail road. On the evening when the accident occurred, the witness (defendants' overseer) said he ordered the negroes of the plaintiff to go around the pond. Just after they were discharged, a hand-car belonging to the rail road under the charge of one Costello came up ; the overseer of the defendants' asked leave to go in it, which was granted, and he got into it ; he said he did not know that any of the plaintiff's negroes were aboard until about the time the accident occurred ; but Costello testified that the defendants' overseer and the negroes applied together for leave to ride through on the hand-car. In the midst of the pond, about half an hour in the night, the party with and on board the hand-car, found that a *locomotive* was approaching ; to avoid which they jumped out of the hand-car, and some descended by the posts of the road safely to the face of the pond, which was covered with strong ice. The slave, George, one of the negroes hired by the plaintiff to the defendants, in attempting to descend fell, and was so much injured that he died in a few days. Upon this evidence the judge below instructed the jury that the covenant of the defendants "*not to expose the plaintiff's slaves to dangers of any kind,*" included their omission, (when their overseer was present,) to prevent the slaves from being in danger, as well as placing them by their command in danger ; and that dangers of *any kind*, meant dangers incident to the rail road, as well as others. That passing upon the rail road after night in a hand-car was dangerous, inasmuch as it was liable to be run down and crushed by a locomotive." The jury found a verdict for the plaintiff, giving him about one-half of the value of the slave ; and a motion for a new trial on the part of the defendants was refused. *Butler v. Walker.* 182.
2. A bill of sale of a negro in the usual form, contained a *warranty* in these words, "to have and to hold all and singular the said negro man George, and I do hereby bind myself, my heirs, executors, administrators and assigns to forever *warrant* and defend the said negro, unto the said T. R." &c. HELD to be a *warranty of title* merely, and

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not of soundness. (O'Neill, J., dissenting.) *Roseman v. Hughey*. 437.

DAMAGES. See **DISCOUNT**, 1, 2, 4, 5, 6, 7.

DEBT. See **AGREEMENT**, 1; **FOREIGN LAWS, JUDGMENTS and JUDICIAL PROCEEDINGS**.

DEBTOR AND CREDITOR. See **ASSIGNMENT**, 1; **INSOLVENT DEBTORS and PRISON BOUNDS ACTS**.

DECEIT. See **DISCOUNT**, 5, 6, 7.

DEED. See **EVIDENCE**, 6.

DESCENT AND DISTRIBUTIONS. See **DEVISE**.

DEVISE.

1. The plaintiff's testator devised among other things, as follows: "It is my will and desire that all the rest and residue of landed and real estate, and of such real estate as may hereafter come to the possession of my executors, now in dispute, and to which I have a claim, be sold by my executors," &c. By another clause, he directs the proceeds of the sales, with other funds, to be applied to the payment of his debts. **HELD**, that by the will, the executors had a *mere power to sell* the lands, and could not maintain an action of trespass to try title, the *fee* itself being in the heir. *Ex'ors of Ware v. Murph.* 54.
2. The distinction is between a devise to executors to sell," as if the testator say, "I devise my land to my executors to be sold," and a devise that the executors shall sell, as where the testator says, "I devise or direct that my lands be sold by my executors." In the *first* case, the *fee* passes to the *executors*; in the last, the fee passes to the *heir*, to be divested whenever the power is executed by the executors. *Ibid.*
3. A direction to the executors to pay the debts from the proceeds of the sales will not vary the rule. *Ibid.*

DISCOUNT.

1. In an action on a note for the purchase money of a negro slave, the vendor's title to which was warranted on the sale, the defendants set up, by way of *discount*, certain defects in the title, and claimed an abatement of the price. The supposed defects depended upon many contingencies; no loss to the defendants had occurred, and it was uncertain whether any injury to them on that account, *would ever* result. The defendants, with a full knowledge of the defects in the title, after the *first* note given for the purchase money fell due, made

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an arrangement with the plaintiff, giving him a new note by way of renewal, payable in a year after with interest, (which was the note now sued on,) during all which negotiation no objection was made on the score of deficiency in the title. The jury found a verdict for the plaintiff, without allowing any abatement, and a motion for a new trial was dismissed. *Madison & Latimer ads, M' Cullough.* 38.

2. In the sale of personal property, (e. g. a negro slave,) where there is a warranty of title, the warranty stands as an indemnity against *loss* from any defect in the title of the vendor; and without *loss*, there can be no claim for abatement in the price of the thing sold by way of *discount*, in an action for the purchase money. *Ibid.*
3. A *discount* must be something capable of valuation; something which can be estimated in *money*. *Ibid.*
4. Under the discount act of this State, (P. L. 246,) the damages sustained by goods in their transportation, *through the fault of the carrier*, may in all cases, whether the freight be agreed upon by the parties or not, be set up as a defence by way of discount to the action by the carrier for his freight, and if such damages are equal to or exceed the freight, the defendant will recover. *Ewarts v. Kerr.* 203.
5. *Deceit* committed by the vendor in the sale of property, like any other fraud, may have the effect to discharge the vendee entirely or partially, from the payment of the consideration money. (S. P. Adams v. Wylie, 1 N. & M'Cord, 78. *Johnson v. Wideman.* 325.
6. But *damages* arising from a *deceit* in the sale of property (e. g. a negro,) cannot be set up by way of *discount*, in an action for the purchase money, so as to entitle the defendant to *recover damages* from the plaintiff. *Ibid.*
7. It has been decided in this State, that torts and trespasses are not the subject matter of discount. *Mitchell v. Gibbes*, 2 Bay 120. In that case the judges said, "the discount law never meant that torts, trespasses, or *unascertained damages* should be set off; that it contemplated debts, dues and demands of a pecuniary nature, or something springing out of a contract, where there were mutual covenants which depended one upon the other." So in *Lightner v. Martin*, 2 M'Cord, 214, Judge Nott said "a set off means a *counter demand* which the defendant has against the plaintiff, and although our set off law is very comprehensive in its terms (embracing any cause, matter or thing,) yet it has always been restricted in its construction to demands arising on contract. Damages arising from slander, assault and battery, *deceit*, and other cases, sounding merely in *damages* have never been considered the subject of set off." A *deceit* is a tort arising, it is true, out of a contract; but the damages are *unascertained*, and are to be measured entirely by the discretion of a jury, and therefore cannot be set up as a *discount*. *Ibid.*

DONATIO CAUSA MORTIS. See **GIFT**, 1, 2, 3.

EMANCIPATION. See **SLAVES**, 1.

EMINENT DOMAIN. See **CONSTITUTION OF THE STATE** and **U. S.**, 1, 2, 3, 4, 5, 6, 7.

ERROR. See **APPEALS** and **COURT OF APPEALS**; **PRACTICE**, 3.

EVIDENCE.

1. The *declarations* of a deceased party to a note, who, if alive, could be examined as a witness in the case to the same point, are incompetent and inadmissible. *Duncan v. Seaborn & Cobb.* 27.
2. James Dugan, by deed dated the 3d of April, 1832, gave to Robert M'Daniel, Nathaniel Gist, Argulous Jeter and William Moore, a large estate, consisting of lands, negroes, stock and debts, to be equally divided among them: "to them and their heirs forever; provided, nevertheless, that the above named Robert, Nathaniel, Argulous and William pay all my just debts, and furnish myself and my beloved wife, Frances, each, with two hundred dollars annually, to commence from this day." The property went into the possession of the donees, and James Dugan had been dead some years. The plaintiffs in this case, the donees under the deed of James Dugan, found among his papers an instrument of writing, in these words: "Received of James Dugan three negroes, say Judy, Harriet and Mary, for the special benefit of Park Dugan's children; that is to say, Mary J. Dugan, Jane J. Dugan and Eliza M. Dugan, for the *ave* right to said property. Witness my hand and seal, this 9th Jan'y, 1830. (Signed) James Rodgers; Test, J. M. Smith. Price, Judy, \$450—Harriet, \$300—Mary, \$200 = \$950." After the death of James Dugan, the plaintiffs required of Rodgers a note for the price of the negroes, which he gave. The present action was on the note, which Rodgers (who was the step-father of Park Dugan's children, and their guardian,) contended he ought not to pay, because the negroes were given by James Dugan to Park Dugan's children. The main question in the case was, whether the negroes had been so given? To explain the transaction, and to prove that there was *no gift*, Mrs. Dugan, the widow of James Dugan, was offered as a witness, by the plaintiffs. She was objected to, and the objection sustained in the court below, on the ground of interest. **HELD**, on a motion for new trial in this court, that Mrs. Dugan was a *competent* witness, and that her testimony should have been received, and a new trial granted on that ground. *Gist et al. v. Rodgers.* 79.
- 3 Where the interest of a witness is of a doubtful nature, it goes to the credit, and not to the competency. A party has such a direct and immediate interest as will disqualify him, when the necessary legal

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consequence of the verdict will be to better his situation, either by securing an advantage or repelling a loss : *he must be a gainer or loser by the event. Ibid.*

4. I cannot see that Mrs. Dugan will be a gainer or loser by the event of this suit. It is barely possible that the loss of this fund will endanger the payment of her annuity. Per Evans, J. *Ibid.*
5. Proceedings in the Court of Equity establishing the *lunacy* of the plaintiff, are admissible as evidence of the fact in an action at law, by him against a third person not a party to the proceedings. *M'Creight v. Aiken.* 56.
6. Where possession of lands has been held under a deed more than thirty years old, the deed is admissible in evidence *as an ancient deed* without proof of its execution. *Wagner et al. v. Aiton.* 100.
7. Where a man is charged with a crime, and does not deny it, a jury is well warranted (especially in connection with strong circumstances) in finding a verdict of guilty. *State v. Stone.* 147.
8. The rule of evidence established by the 5th sec. of the act of 1834, p. 14, in relation to illegal traffic with slaves applies only to cases arising under the act of 1817. *Ibid.*
9. Though the act of 1834 as to *vendors of liquors, &c.* may be considered as repealing the penal provisions of the act of 1817, yet the rule of evidence established by the act of 1817 (which requires the defendant to produce and prove the written permission of the owner or employer to deal, trade or traffic,) remains in full force, and applies to indictments under the act of 1834. *Ibid.*
10. Where the original proceedings in partition were proved to have been lost and on diligent search, could not be found, *secondary evidence*, consisting of entries in the sheriff's books and in the minutes of the court, were held admissible in proof of the plaintiff's title, under the partition. *Smith v. Smith.* 232.
11. In an action on a lost note, the plaintiff is incompetent to prove the loss of the note sued on. His declarations are equally incompetent to the same purpose. (S. P. Sims v. Sims, 2 Con. Rep. 225; Davis & Tarlton v. Benbow, 2 Bail. Rep. 428; Darby v. Rice, 2 N. & M'Cord. Rep. 598.) *Mothershed v. Cliburn.* 293.
12. The admission of an administrator as to a fact within his own *personal* knowledge, and which he could be compelled to prove, if he were not a party to the suit, is admissible in evidence in an action against him as administrator, to charge the estate of the intestate. *Slead v. Brannan, adm'r.* 298.
13. On a summary process against an administrator, by the plaintiff, to recover the amount of a note signed by himself and the defendant's intestate (Crowder,) which the plaintiff had paid, and which he alleged he had signed as security only for Crowder, the declaration of

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the administrator, "that *he knew* the note was given by Crowder at Ingraham's sale, and that Slead, the plaintiff, was security," was held competent and sufficient evidence of the fact. *Ibid.*

14. Under the 34th rule of court in relation to the process jurisdiction, it *seems* the administrator (the defendant,) might have been examined to the same point upon interrogatories, and would have been compelled to answer. *Ibid.*
15. The general rule established by all the cases is, that to render a witness incompetent on the ground of interest, his interest in the event of the suit should be a present, certain and vested interest, and not uncertain and contingent. *Spann v. Ballard.* 440.
16. Where in an action by an administratrix for the recovery of a debt due to the intestate, one of the heirs at law, and a distributee of the estate who had received his share and settled with the administratrix, was offered as a witness and objected to on the ground of interest, the witness executed and tendered an assignment or release of all interest in the recovery; it was still contended that he was incompetent by reason of his liability to refund, in case of further claims against the estate not yet exhibited. HELD, in the absence of any proof of outstanding demands or deficiency of assets in the hands of the administratrix, that the supposed interest of the witness in increasing a fund out of which he could receive no dividend, was too remote and contingent to sustain the objection. *Ibid.*

EXECUTION.

Under our acts of 1721, (P. L. 116,) and 1785, (P. L. 379,) an execution issuing out of the Court of Common Pleas of any district, creates a lien upon the personal property of the defendant, *throughout the State*, from the time of its lodgment in the sheriff's office; and is not confined to property in the district in which the execution is lodged. (S. P. Woodward v. Hill, 3 M'Cord. Rep. 241.) *State v. O'Conner.* 150.

EXECUTORS AND ADMINISTRATORS.

1. A plea of *plene administravit*, if filed without "a full and particular account of the defendant's administration, upon oath, accompanied by an office copy of the inventory and appraisement of the estate," as required by the 6th rule of court, (1 Con. Rep. xiv.) is improper, and may be stricken out on motion. *Ford (Com.) v. Rouse's adm'r.* 219.
2. A plea that "due notice was given to creditors to render in their demands against the defendant's intestate, and that in default thereof by the plaintiff, to render an account of his demand, all the goods and chattels of the intestate, which were at the time of his death, and which have ever come into the hands of the defendant as ad-

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ministrator, have been distributed ; and that the defendant hath not, nor on the day of the commencement of this suit, or at any time since, hath or had any of the goods or chattels of the intestate, but the same are fully administered," &c. is only another variety of the plea of *plene administravit*, and is equally objectionable with that plea, if filed without the account, inventory, &c. required by the 6th rule of court. *Ibid.*

3. Such a plea is also objectionable, as pleading a matter *specially*, which could properly be put in issue under the plea of *plene administravit*, by the plaintiff's replication and the defendant's rejoinder. *Ibid.*
4. Such a plea as the above, (independently of these objections) is no answer to the plaintiff's declaration. The plaintiff seeks to recover *now* his debt out of the assets of the intestate. The only answer for the want of assets is *plene administravit*, generally, or *præter*. This is neither the one or the other in a legal point of view, and cannot be allowed as a bar to the plaintiff's demand. *Ibid.*
5. The object of the 22d sec. of the act of 1789, P. L. 494, which provides "that every executor or administrator shall give three weeks notice, by advertisement, for creditors to render an account of their demands ; and that they shall be allowed twelve months to ascertain the debts due to and from the deceased ; and as to creditors neglecting to give in a statement of their debts within the time aforesaid, the executors or administrators *shall not be liable to make good* the same," &c. is to protect an executor or administrator from a *personal* liability for the debt not rendered in. If there still remain an abundance of assets, in the hands of the executor or administrator, it would be no objection to the plaintiff's recovery, that the executor or administrator had given the legal notice, and that the plaintiff had failed to give a state of his debt. The plaintiff would still be entitled to a judgment *de bonis testatoris*. *Ibid.*
6. The only four cases, *it seems*, where an executor or administrator would be estopped from denying assets, are 1st, where he confesses judgment ; 2d, where he suffers judgment by default ; 3d, where he pleads *plene administravit*, and 4th, where he pleads *plene administravit* generally, or *præter*, and his plea has been traversed, and the jury find a sum *ultra* in his hands. *Ibid.*
7. In this state, a *devastavit* can only be established against an executor or administrator, 1st, by establishing the testator's debt by matter of record, (i. e. a judgment recovered against the executor or administrator *de bonis testatoris*); 2d, assets admitted by the defendant's plea, confession, or default, or found by the verdict of a jury, on and against the plea of *plene administravit* generally, or *præter* ; and 3d, that the defendant has wasted such assets. The only other mode of reaching an administrator *personally*, is by an account before the ordinary, or in equity, preparatory to a suit on his bond. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

8. A plea by the defendant, an administrator, of a decree in equity, in a case to which the plaintiff was no party, is a plea of *res inter alios acta*, and no bar of the plaintiff's right of action. *Ibid.*
9. An administrator who has never had possession of the goods of his intestate may notwithstanding maintain trover in *his own name*, for a conversion of such goods after the death of the intestate. (S. P. Hill v. Brannon, 285.) *Kerby v. Quinn.* 264.
10. The general rule is, that the owner of a chattel *entitled to immediate possession*, may maintain trover against a wrong doer; the legal effect of granting administration, is to vest in the administrator the *legal estate*, in all the intestate's personal property, and this has relation back to the death of the intestate. He is the legal owner, the letters of administration are the evidence of his title, and hence for a conversion in *his own time*, he must always produce and give in evidence the letters of administration.—(S. P. Browning v. Huff, 2 Bail. 174.) *Ibid.*
11. In such a case it is not necessary or proper that he should sue in his representative character, or style himself *administrator*. *Ibid.*
12. The plaintiff was a creditor of one Stephen Wilson, (deceased.) After the death of Wilson, his wife advertised and sold his personal estate; at this sale the defendants severally purchased. Taylor bought a horse, for which he subsequently paid, (what the defendant in the other case bought did not appear). The plaintiff had notice of the sale, but made no objection; the defendants probably knew that no administration had been taken out on the estate. HELD, that although the acts done by the widow of the deceased were such as might have been done by a rightful executor, and the defendants probably knew there was no administration, yet they might have bought, supposing her to be the executrix of the testator's will, and were not liable as executors *de son tort*. *Nesbit v. Taylor, Ex'or.; Same v. Daysields.* 296.
13. A creditor has no right to the property of the deceased, he is merely to be paid out of it: when it is shown that it has been sold by one who had no rightful authority to sell, that act constitutes the party selling it an *executor de son tort*, and makes him liable to the extent of the funds *thus* received, for the creditors debt. This is enough for his rights, and he has no right to follow the property into the hands of the *vendee*. *Ibid.*

See DEVISE, 1, 2, 3; EVIDENCE, 12, 13, 14; ORDINARY, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

FEE SIMPLE. See DEVISE, 1, 2; REMAINDER, 1, 2.

FEEES. See SHERIFF, 1, 2, 3.

FEOFFMENT. See **REMAINDER.**

FINES AND FORFEITURES. See **ANDERSON**; **MOULTRIEVILLE.**

FISH AND FISHERY.

1. The plaintiff had constructed a fishery consisting of several fish traps, on a line between the adjacent islands in the *Congaree* river, at a distance of eighty or ninety yards with the customary dam; having obtained the permission of the proprietor to use the shores of the islands for that purpose. The defendants, professing to be performing their duty as commissioners of fish sluices on Broad River, cut away and destroyed one of the traps, and thereby opened a sluice which rendered the traps of no value. HELD, that an action of trespass vi et armis, would lie for the injury—and plaintiff having obtained a verdict, a new trial was refused. *Boatwright v. Bookman et al.* 447.
2. The right of fishery in the public *navigable* rivers of this State, considered at length and recognized. *Ibid.*

FOREIGN LAWS, JUDGMENTS AND JUDICIAL PROCEEDINGS.

1. A judgment recovered before a justice of the peace in another State, though wanting some of the characteristics of a *judgment*, technically speaking, and *not* considered as a matter of *record*, is to be regarded in the courts of this State as *prima facie* evidence of debt, and is placed precisely on the same footing as *foreign* judgments, by the *common law*. Such judgment is, therefore, a good foundation for an action here, independently of the original cause upon which it was rendered. *Clark & Smith v. Parsons.* 16.
2. General reputation is not competent evidence of the authority of a justice of the peace of another State: a transcript of the act appointing the justice and conferring on him his authority, would be higher evidence in the power of a plaintiff to produce—and, it seems, the printed laws of another State, published under the authority of the legislature of the State, would also be competent evidence. [See *Allen v. Watson et al.*, 2 Hill. R. 319.] *Ibid.*
3. By a law of the State of Georgia, demand and notice are dispensed with, and indorsers and assignors of notes are made liable as securities. By the same act, the holder forfeits his remedy if he does not *sue in three months* after notice to do so. The defendants in this case, who were citizens of South-Carolina, bought a negro from the plaintiff, who resided in Georgia, and transferred by indorsement, to the plaintiff, two notes of one J. J. Logan, in payment. The contract was made in Georgia, but the plaintiff knew the defendants resided in South-Carolina. HELD, that the contract of indorsement in this case was to be interpreted by the law of Georgia. *Holt v. Salmon & Stroud.* 91.

FOREIGN LAWS, JUDGMENTS AND JUDICIAL PROCEEDINGS

4. Under the second section of the law of Georgia, (referred to,) if the plaintiff does not sue within three months after notice to do so, the indorser is discharged. But it is not enough, *it would seem*, for the indorser in such a case, to prove that he has given the plaintiff notice to sue, in order to discharge himself from the indorsement; the burden rests upon him to show also that the plaintiff had neglected to sue for *three months* after notice. *Ibid.*
5. The declaration in this case set out the making of the note, the indorsement by defendants, demand and notice, and alleged that the defendants became liable to pay, &c. **HOLD**, sufficient in reference to the law of Georgia, which dispenses with demand and notice, and makes the liability of the indorser an absolute and not a conditional one. The allegation of demand and notice, though unnecessary, does not vitiate the declaration, and may be rejected as surplusage.—*Ibid.*

FRAUDS.

1. This was an action brought by the plaintiff, *Archer*, against the defendant as sheriff, for an alleged trespass, in taking out of his possession a negro woman named *Sarah*, and her two children, and selling them as the property of one *Van Lawhon*, under a judgment and execution against the latter, in favor of one *Cherry*. It appeared that *Sarah* was originally the property of *Archer*; that *Van Lawhon* married the plaintiff's daughter, and that soon after his marriage, he removed from *Archer's*, where he had previously resided, and that *Sarah* went with him, and continued in his possession up to a short time before the levy, with all the usual indications of ownership. *Cherry* was previously a partner of *Van Lawhon's*, and, after the dissolution of the copartnership, a creditor to a considerable amount, for which he took *Van Lawhon's* note, and subsequently a confession of judgment, upon which the execution issued under which the property was sold. The jury found a verdict for the defendant, and the court refused to grant a new trial. *Archer v. M'Fall*. 73.
2. In the opinion expressed in this case, the court say, "*Archer* had been the owner of the negroes at one time, and to divest him of his title, it was necessary the defendant should have shown some contract whereby his title had been transferred to *Van Lawhon*, or that he had done some act, by means of which *Van Lawhon's* creditors had been deceived and defrauded. In this case, the possession of *Van Lawhon*, as proved, was such as would in law be construed a gift, even in a controversy between him and *Archer*, but for the fact which was proved mainly by *Van Lawhon* himself, (who was a witness in the case,) that the negro came into his possession as a loan; others, however, who knew nothing of this understanding between the parties, had a right to regard *Van Lawhon* as the owner." *Ibid.*

FRAUDS.

3. I take it to be well settled by a number of decisions, that if Van Lawhon, thus in possession, acquired a credit upon the faith and confidence that Sarah and her children belonged to him, a creditor who trusted under these circumstances, had a right to subject the property to the payment of his debt.—Per EVANS, J. *Ibid.*
4. But to entitle a creditor to this position in such a case, it should be made to appear, 1st, that he is a *subsequent* creditor without notice; and, 2d, that he trusted his debtor on the faith and belief that the property was his.—Per EVANS, J. *Ibid.*

FREIGHT. See COMMON CARRIERS, 12, 13, 14, 15, 16, 17.

GEORGIA. See FOREIGN LAWS, JUDGMENTS and JUDICIAL PROCEEDINGS, 3, 4, 5.

GIFT.

1. The delivery of a note by a party in his last illness, by which the maker "at his death promises to pay, or cause his executors or administrators to pay, a certain sum of money to the payee or his heirs," creates no obligation on the part of the maker, or his representatives, after his death, and cannot be supported or enforced as a *donatio causa mortis*, of the money mentioned in the note. *Hall v. Adm'rs. of Howard.* 310.
2. To constitute a valid gift either *inter vivos*, or *causa mortis*, the donee must have an *immediate* right to the dominion of the *chattel given*; in the latter case defeasible on the recovery of the donor. *Ibid.*
3. Quere.—Under the spirit of the law of this State, which requires three witnesses to a will of *personal* as well as of real property, how far are donations *causa mortis* to be countenanced by our courts?—*Ibid.*

See FRAUDS, 1, 2, 3, 4.

GRANT. See TRESPASS TO TRY TITLE. TRESPASS QUARE CLAUSUM FREGIT.

GUARDIAN AND WARD.

1. In an action of assumpsit by plaintiff, as the *guardian* of two infants, his wards, the counts in his declaration stated in substance, that the defendant had *received* the money of the infants, and in consideration thereof, had promised to pay the plaintiff their *guardian*. HELD, that the plaintiff could only entitle himself to recover by showing, 1st, his guardianship; 2d, the receipt of the money by the defendant; and, 3d, an express promise to pay the money to him as *guardian*. *Brooks ads. Sullivan, (guardian).* 41.

GUARDIAN AND WARD.

2. Where money has been received by another belonging to an infant, the promise to pay, which the law *implies* on the part of the receiver, is implied to the infant and not to the guardian of such infant. *Ibid.*

GUARANTY.

1. A letter of guaranty was given by the defendant to the plaintiff, by which the defendant consented to be liable for the amount which a third person whom he recommended as a customer to the plaintiff, might, at the time of the delivery, receive. The party received goods to the amount of \$225 03½. Defendant repeatedly acknowledged his liability to pay this amount, and afterwards promised to pay the same. HELD, that inasmuch as interest was not recoverable by our law, against the principal debtor upon the open account, in this case, the obligation imposed by the guaranty making defendant liable only to the same extent, interest could not be recovered from him. *Bishop v. Ross.* 21.
2. Action of assumpsit on a letter of credit or guaranty, in the following words: "Charleston, 12th October, 1825. Messrs. Boyce & Henry. Gentlemen—Our brother, Samuel Ewart, is about to commence business on his own account in Columbia. To assist him in which, he will stand in need of your aid and indulgence, which, if you render him, (in case of his failure or delinquency,) we will indemnify you to the amount of four thousand dollars; and you will greatly oblige, gentlemen, yours, &c., D. & J. Ewart." HELD, in the opinion of a majority of the court, not to be a *continuing guaranty*, for the amount of \$4000, which S. Ewart might, *at any time*, in the course of his mercantile dealings with the plaintiffs, owe them; but that by its true construction, it could only be regarded as intending to secure the plaintiffs to the amount of \$4000, in any *aid* which they might render S. Ewart, in the *commencement* of his business as a merchant; and that as soon as S. Ewart, for any dealings had with Boyce & Henry, under the letter of guaranty, paid to the amount of \$4000, D. & J. Ewart were absolved from all further responsibility. [O'NEALL and EVANS, Justices, *dissenting*.] *Boyce & Henry v. D. & J. Ewart.* 126.
3. The plaintiffs, Boyce & Henry, had dealings to a large amount with S. Ewart, after the date of the letter of guaranty, down to the 6th of January, 1832, when the plaintiffs closed their account current with S. Ewart, and took his note for the balance due them, say \$16,000—payable one day after date. HELD, by a majority of the court, that the statute of limitations commenced to operate from the 6th of January, 1832; and that four years from that period, the bar of the statute was complete, and that this suit not having been instituted within four years from the closing of the dealings between the plaintiffs and S. Ewart, the plaintiffs were barred from a recovery in this ac-

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tion, if the circumstances of the case would otherwise have admitted it. [O'NEALL, J., dissenting.] *Ibid.*

HABEAS CORPUS. See **SHERIFF**, 1, 2, 3.

HARBORING. See **SHIPS** and **SEAMEN**.

INDEMNITY. See **SALE OF LANDS** and **CHATTELS**, 2.

INDICTMENT.

1. An indictment for murder had been found by the grand jury, on the 22d of October, 1838. On the 24th the prisoner was arraigned, pleaded not guilty, and put himself for trial on the country. A jury was impanelled and charged, (the prisoner exercising his right of challenge). The solicitor had called his first witness, who was not sworn, when one of the jury called the attention of the solicitor to the fact, that the felony charged in the indictment was laid to have been committed on the 23d of October, 1838, the day succeeding the finding of the bill, instead of the 23d of the preceding month. The error being brought to the view of the court, the presiding judge ordered the record to be withdrawn from the jury, and that they be dismissed.—**HELD**, that inasmuch as no judgment could be rendered against the prisoner upon the indictment in this case, he had been put in no jeopardy of life, and was not, therefore, entitled to be discharged, but still liable to be tried on another valid indictment for the same offence.—*The State v. Ray*, 1.
2. There can be no legal trial in a capital case, without a sufficient and valid indictment. An indictment alleging the offence to have been committed in another district than the one in which the bill was found, would be insufficient and invalid; and equally so, if it assigned an *impossible* date to the commission of the offence, as a day *posterior* to the finding of the indictment. *Ibid.*
3. An acquittal upon an invalid and insufficient indictment, is no bar to a second indictment for the same offence. *Ibid.*
4. Where an indictment in a capital case is so utterly defective that no judgment can be pronounced upon it, either of conviction or acquittal, the judge on circuit, in the exercise of his discretion, may properly withdraw the record from the jury and discharge them from the further consideration of the case, without the consent of the prisoner, and remand him for trial at a succeeding court. *Ibid.*
5. The cases in which and the principles upon which the circuit judge should exercise his discretion as to discharging a jury in a capital or other criminal case stated. *Ibid.*

INDICTMENT.

6. Indictments for riot—motion in arrest of judgment. The indictments charged in substance, “that the defendants unlawfully, riotously and routously, assembled together to disturb the peace of the State, and being so assembled, did make great noise, riot, tumult and disturbance, for a long space of time, to the great terror and disturbance of the people,” &c. HELD, conformable to the precedents in such cases and sufficient. Motion refused. *The State v. Wm. Brazil, Wm. Griffin, James M'Echerin et al.*; *The Same v. Wm. Brazil, Eli Beach et al.*; *The Same v. L. B. Bowie, Hugh Miller, J. M'Echerin et al.* 257.
7. Where an indictment for a riot charged that the two defendants, who were named, with divers other persons, *to the jurors unknown*, to the number of ten, did assemble, &c. HELD, sufficient to sustain a verdict of guilty against the two defendants, who were tried and convicted. It is not necessary to allege that a riot was committed by three persons named in the indictment. It is sufficient to name those who are known and to allege that the others were *unknown*. *Ibid.*
8. On an indictment for a riot, conformable to the usual precedents, after a general verdict of guilty, it is, it seems, wholly immaterial whether the facts proved establish that the defendants are guilty of a riot, rout, or unlawful assembly. They are kindred offences, and the greater includes the less. A general verdict of guilty, therefore, on an indictment for a riot will be supported, although the evidence establishes no more than an unlawful assembly. *Ibid.*
9. The general rule is, where an accusation includes an offence of inferior degree, the jury may discharge the accused of the higher crime and convict him of the less atrocious. *The State v. Gaffney.* 431.
10. An indictment under the act of 1821, for the murder of a slave, includes within it the inferior offence of “killing in sudden heat and passion,” to the same extent and for the same reasons, that murder at common law includes manslaughter; and, therefore, on such an indictment, the prisoner may be convicted of the inferior offence described in the second clause of the act, “of killing on sudden heat and passion.” *Ibid.*
11. In England, it seems that on an indictment for a felony, the defendant cannot be convicted of a misdemeanor, and that a count for a misdemeanor cannot be joined with a count for a felony: The reason assigned for which, (to wit, that persons on trial for misdemeanor, have certain privileges that are denied to persons charged with felony,) has no existence with us, as by an act of the legislature, (2 Brev. Dig. 188,) these privileges are extended to all persons indicted for felony or other crime. In this State, therefore, the rule would seem to be otherwise, and that one indicted for a felony, may be convicted of a misdemeanor. *Ibid.*

See JURISDICTION, 10, 11, 12. RETAILING, 1, 2, 3. RIOT, 4, 5.

INFANT. See GUARDIAN and WARD.

INSOLVENT DEBTORS AND PRISON BOUNDS ACTS.

1. In this case there had been an appeal to this court from the verdict of a jury, upon a question of *fraud*, tried before a commissioner of special bail, under the act of 1833. The appeal court ordered, that on the prisoner's assigning his schedule according to law, he be discharged. The prisoner was subsequently brought before the commissioner, offered to assign over his property, and claimed to be discharged. His application was opposed by the plaintiff, on the allegation principally, that the defendant had not delivered the property in his schedule to the plaintiff, which it was said he had in his possession after his arrest. The defendant offered to deliver to the plaintiff's *attorney* (the plaintiff himself being in another State,) the property and choses in action assigned, except a *black horse*, which had been seized and taken by the sheriff in execution, and left in the defendant's possession, under a bond executed by him and his sureties for the delivery of the horse to the sheriff, for the purpose of sale under the levy. This offer was declined, and the commissioner discharged the defendant, and the plaintiff appealed from the order of the commissioner to this court. HELD, that after an appeal from the verdict of the jury under the act of 1833, has been heard and decided, and the prisoner has been directed to be discharged, upon assigning his schedule and delivering to the assignee the property mentioned therein, which has been in his power since his *arrest*, the act of 1833 does not give or contemplate *another appeal* to this court, for any supposed error in the commissioner's discharge of this duty. *Graham ads. Beckner.* 44.
2. Before the act of 1833, no appeal lay, under any circumstances, from the decision of the commissioner of special bail. The legislature, by that act, have thought proper to give the right of *appeal* in a single instance, that of the finding of the jury upon questions of fraud and undue preference, or upon the allegation that the prisoner has gone beyond the prison rules. So far, the jurisdiction of the commissioner of special bail has been divested of its exclusive character; in all other respects, it remains unaltered. *Ibid.*
3. If the commissioner of special bail commits an error in matter of *law*, in the final order of discharge, his error in that respect may be corrected by writ of *certiorari*. *Ibid.*
4. The decision of the commissioner in this case, upon the circumstances stated, said by O'NEALL, J., to be correct. *Ibid.*
5. An assignment of the whole estate and effects of a debtor, for the benefit of his creditors *generally*, though upon trusts, *preferring in the order of payment* one creditor to another, has been recognised in this State as valid and binding. (See *Niolon v. Douglass et al.*, 2 Hill.

INSOLVENT DEBTORS AND PRISON BOUNDS ACTS.

Ch. R., 443, 446). *Smith, Wright & Co. v. C. C. Campbell & Co.* 352.

6. Such a preference is not "the *undue preference* of one creditor to another," contemplated by the 7th section of the prison bounds act, (P. L. 456,) and in itself constitutes no sufficient ground of opposition to the discharge of a debtor under the provisions of that act. *Ibid.*
7. By the *undue preference* spoken of in the prison bounds act, is meant such an *intentional* preferring of *one creditor*, as may enable him to receive payment, and *altogether defeat, delay, or hinder*, another creditor from being paid: a preference to come within the inhibition of this act, must be *fraudulent*. *Ibid.*
8. Where a deed of assignment for the benefit of creditors *generally*, though upon trusts, preferring in the order of payment some creditors to others, conveyed to the assignees all the effects of the assignor, and among other things choses in action to a considerable amount: HELD, that such assignment could not, on the face of the deed, be considered as made to *defeat, delay or hinder*, the plaintiffs, creditors of the assignor, though not among the preferred creditors.—*Ibid.*
9. Where upon the trial of an issue upon a suggestion of fraud, before a commissioner of special bail, a question is put to a witness touching his opinion of the value of certain property assigned, which question is objected to and overruled by the commissioner: This court will not grant a new trial on that ground, if it perceives the point has been answered to by the witness in other parts of his testimony, as far as the nature of the inquiry would allow. *Ibid.*

INSURANCE.

1. Where the master fails to employ a *pilot* to navigate a vessel in coming into or leaving a port, where it is customary to do so, (as the port of Charleston,) and a loss happens in consequence of a pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured through the dangers, to avoid which a *pilot* is usually employed, and the loss happens at a point beyond which the pilot's services ceases to be necessary, the assured would be entitled to recover. *M'Millan & Ewart v. The Union Insurance Company.* 248.
2. It is an error to consider the employment of a pilot, in coming into or leaving a port, as a part of the seaworthiness of the vessel; nothing can enter into that which is not for the whole voyage. The business of a *pilot* is merely *temporary*. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally. Under such circumstances, it would be an abuse of terms

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to say, that a competent pilot was necessary to make a vessel *seaworthy*. The true principle seems to be, that if a vessel, without a pilot, sustain injury in entering or leaving a harbor where it is customary to have a pilot, such injury does not come within the perils insured against. *It is not a peril of the sea*. It is a loss from the bad navigation of the vessel, and is to be set down to the fault of the *master*, and consequently the *owners* would be liable and not the *underwriters*. [Per O'NEALL, J.] *Ibid*.

INTEREST.

1. A letter of guaranty was given by the defendant to the plaintiff, by which the defendant consented to be liable for the amount of goods, which a third person whom he recommended as a customer to the plaintiff, might at the time of the delivery receive. The party received goods to the amount of \$225 03. Defendant repeatedly acknowledged his liability to pay this amount, and afterwards promised to pay the same. HELD, that inasmuch as *interest* was not recoverable by our law against the principal debtor upon the *open account* in this case, interest could not be recovered from the defendant.—*Bishop v. Ross*. 21.

JOINDER. See JOINT INTERESTS and LIABILITIES.

JOINT INTERESTS AND LIABILITIES.

1. Defendants executed and delivered to the plaintiff the following paper: "I promise and agree to execute a good and legal mortgage to A. W. Thompson for any piece of land he may wish that will be sufficient to pay him a debt of one hundred and fifty dollars, which *we* owe him for defending a case in the Court of Equity, James Tolison against us, given under our hands and seals, this 12th April, 1838. It shall be as much as one hundred and fifty acres and no more except we wish it." S. Crocker, one of the defendants, subsequently did execute a mortgage to the plaintiff, which was accepted by him. HELD, that according to the true construction of the instrument it was an acknowledgment of a debt due by *both*, with an agreement that *one* of them should give a specific lien by mortgage to secure the payment; and that notwithstanding the delivery of the mortgage, the debt remained the debt of *both*, and an action would lie against both. Nonsuit granted below, set aside. *Thompson v. S. & W. Crocker*. 23.
2. In the case of *co-sureties* who pay the debt of their principal, the general rule is, that each must sue for the amount paid by himself; and if they were to join, their interest generally being several, they would fail. But where the debt of the principal has been paid out of

JOINT INTERESTS AND LIABILITIES.

a *joint fund* or by the *joint credit* of the sureties, then the payment being a joint act and creating a joint interest, they may sustain an action against the principal in their joint names. *Stewart & Cooper v. Vaughan.* 33.

3. In an action of *assumpsit*, the declaration counted upon a joint contract by the defendants, to carry 14 bales of cotton for freight from Hamburg to Charleston, in the steamboat *Augusta*, of which the defendant, Magrath, was owner, and the other defendant, Brooks, master; and alleged a loss of the cotton by negligence. The evidence of the contract was a bill of lading for the cotton shipped on board the *Augusta*, signed by the defendant, Brooks, the master only. HELD, that the contract was several and not joint, and that the defendants were improperly joined. New trial ordered, and that at the hearing of the case below, the plaintiffs would be obliged to be nonsuited. *Patton's adm'r v. Magrath & Brooks.* 162.
4. In an action on the *case* against several joint defendants, the plaintiff may, *it seems*, recover, on proof of a sufficient cause of action against *one*, and the joinder of too many defendants furnishes no objection to such action, or a recovery. But the rule is otherwise in *assumpsit*, and is perhaps questionable when applied to an action on the *case ex quasi contractu*. The case of *Govett v. Radnidge et al.*, 3 East. 63, and the subsequent cases on this subject commented on by the court. The result of the later authorities would seem to show, that in actions on the *case ex quasi contractu*, as well as of *assumpsit*, against several defendants, the plaintiff must show a joint liability of all, or he will fail. *Ibid.*

JUDGE. See INDICTMENT, 4, 5; JURISDICTION; JURY.

JUDGMENT (IN PARTITION.) See TRESPASS TO TRY TITLE.

“ ARREST OF. See ACTION ON THE CASE, 1; INDICTMENT, 6.

“ FOREIGN. See FOREIGN LAWS, JUDGMENTS and JUDICIAL PROCEEDINGS, 1, 2.

JURISDICTION.

1. By the act of incorporation of the village of Anderson, power is given to the “Town Council to impose fines for the violation of their ordinances, and if for less than \$20, to try the offender.” The plaintiff was alleged to have committed a breach of an ordinance by exhibiting certain shows. For this he was summoned before the council and fined. He paid the fines, and brought an action before a magistrate to recover them back. HELD, that if the council had not jurisdiction of the subject, the plaintiff's remedy was by *prohibition*, and

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that after paying the fines imposed, an action to recover back the money would not lie ; and that if they had jurisdiction of the subject their judgment was final. *M'Kee v. Town Council of Anderson.* 24.

2. The judgment of a court of competent jurisdiction on a matter within its cognizance is conclusive. *Ibid.*
3. In the act incorporating the village of Moultrieville, the power of making bye-laws is conferred on the Town Council : the act further provides, "that the said Town Council may affix fines for offences against their bye-laws and appropriate the same for the public uses of the island, but no fine shall exceed twenty pounds sterling for any one offence, which fines, where they exceed five pounds sterling, may be recovered in the Court of Common Pleas in Charleston, and when under the sum of £5, before the Intendant and Wardens, or any two of them. *State ex relatione Truesdale v. The Town Council of Moultrieville.* 158.
4. An ordinance of the Town Council provides, "that from and after the passing of this ordinance, it shall not be lawful for any person or persons, at any time, to cut down and make use of the cedars or other trees on the east end of the island, known as the "myrtles," for posts, ship timber, or for any other purposes whatever, except for fascines to resist the encroachment of the sea : any person or persons offending in the same shall forfeit and pay for each and every offence, to the use of the corporation, the sum of \$5, to be recovered before the Intendant and Wardens." *Ibid.*
5. The relator in one proceeding before the Intendant and a Warden, and by one judgment had been convicted of forty different offences under this ordinance, and fined \$5 for each offence, making an aggregate of \$200 ; each offence being supposed to consist in each tree by him cut down. *Ibid.*
6. The specification of the relator's offence was, "that he cut down at various times a cedar tree, and did from time to time continue cutting down the same, until he committed one hundred violations of the ordinance aforesaid, by cutting down one hundred trees." HELD insufficient, in not setting out that the relator "made use of the cedars" by him cut down, as the offence under the ordinance does not consist merely in cutting down, but in cutting down and making use of the trees. *Ibid.*
7. The matter as charged in this specification, amounts to no more than a *single* offence, for it may well be that every tree cut down by the relator, of which he stood convicted, were cut on one day, and under the ordinance, the cutting down more trees than one *at one time* would be but *one offence.* *Ibid.*
8. Under the act of incorporation above referred to, the Town Council had no power by *one* judgment, to fine for more than £5. This is

JURISDICTION.

limited by the act, and according to its very words, "where the fines exceed £5 they are to be recovered in the Court of Common Pleas for Charleston." In this case, the fines imposed, and about to be collected, under the warrant of the Town Council are far beyond the sum thus limited. It will not do to say they are for separate offences. They are imposed at one sitting, and for offences anterior to it, and thus make an aggregate of fines incurred by the party beyond £5, and one therefore according to the charter to be sued for and collected in another jurisdiction. *Prohibition* ordered. *Ibid.*

9. Since the passage of the act of 1824, it has been repeatedly decided, that in *summary process* cases, to entitle himself to a decree, the plaintiff must establish to the satisfaction of the presiding judge, a demand *beyond twenty dollars*. See Davidson v. Setzler; Cline v. Craven; Logan & M'Intyre v. Cobb, (not reported;) and Ferguson v. Femster, 1 Bail. 516: an exception in the case of Nance v. Palmer, 2 Bail. 88, was compelled to be made where the case went to the jury. *Allen v. Singleton*. 289.
10. A State Court has no jurisdiction over the offence of stealing a letter from the mail in violation of the act of Congress of 1825, regulating the post office department. (The case of the State v. Wells, 2 Hill, 687, *contra* overruled.) *The State v. M'Bride*. 400.
11. By the constitution of the United States, as well as upon general principles of law, a criminal offence arising under, and created by, an act of Congress, is punishable *only* in the courts of the United States. *Ibid.*
12. An act of Congress conferring jurisdiction in such a case upon the State Courts, is unconstitutional and void. *Ibid.*

See JUSTICE OF THE PEACE, 1.

JURY.

1. Where an indictment in a capital case is so utterly defective, that no judgment can be pronounced upon it, either of conviction or acquittal, the judge on the circuit, in the exercise of his discretion, may properly withdraw the record from the jury and discharge them from the further consideration of the case, *without the consent of the prisoner*, and remand him for trial at a succeeding court. *State v. Ray*. 1.
2. The cases in which, and the principles *upon* which, the circuit judge should exercise his discretion as to discharging a jury in a capital or other criminal case stated. *Ibid.*

JUSTICE OF THE PEACE.

In all cases of contract, where the demand does not exceed twenty dollars, the jurisdiction of a Justice of the Peace is, by the act of 1824, p. 25, declared to be exclusive. *Allen v. Singleton*. 289.

JUSTICE OF THE PEACE OF ANOTHER STATE. See **FOREIGN LAWS, JUDGMENTS and JUDICIAL PROCEEDINGS**, 1, 2.

LIEN. See **COMMON CARRIERS**, 12, 13, 14, 15, 16, 17; **EXECUTION**, 1.

LIMITATIONS STATUTE OF.

1. Under the statutes of limitations, of 1712 and 1824, (P. L. 101, a. a. 1824, p. 24,) the settled construction is, that the right or title to lands, and the consequent remedy by action for an injury to the same, by withholding the possession, can only be barred by an actual *pedis possessio*, for the time fixed by the acts. The reason of this seems to be, that until there is an actual permanent possession by some claimant, the party to whom the *right* or *title* to the land accrued, cannot prosecute it. *King v. Smith.* 10.
2. The principle that an actual possession of a part of a tract of land, by *color of title*, for more than five years, under the act of 1712, would bar the right of a claimant to prosecute the same, has been irrevocably settled since the case of *Reid v. Eifert*, reported in a note to 1 N. & M'Cord's Rep. 374: The subsequent cases on this subject reviewed. These cases clearly show that the operation of the act of limitations depends upon an actual possession of the land in dispute, and not upon a mere *non claim* by the plaintiff. *Ibid.*
3. They also show that the plaintiff's right of action for the *locus in quo*, must have existed against *some one* for more than the time allowed by the law, or he cannot be barred. If, therefore, any one, before the defendant, had an actual possession for more than *five* or *ten* years (as the case may be,) it would bar the plaintiff as well as if it had been in the defendant. *Ibid.*
4. But, *unconnected* possessions, *each* being for a shorter time than that limited by the statutes, but when joined together making *five* or *ten* years, cannot be united so as to bar the plaintiff. *Ibid.*
5. In actions of trespass to try title to lands, the bar of the statute of limitations can only be interposed to prevent the plaintiff from recovering where he has had a right of action against the defendant, or *some one*, for the *locus in quo*, for *five* or *ten* years, as the case may be, and has during that time failed to prosecute it. *Ibid.*
6. A defendant, who has been in possession of lands for a less time than the statutory period, cannot *unite* his possession with that of a previous tenant, from whom he purchased, in order to make out the five or ten years required by the statute, to bar the plaintiff's right of recovery; for, until that period has run out, they are both to be regarded, as it respects the true owner, as mere trespassers. A conveyance from the first to the second tenant, under such circumstances, conveys nothing. *Ibid.*
7. If both possessions could be referred to one entry, as in the case of landlord and tenant, or in the case of a descent from a *disseisor* to

LIMITATIONS STATUTE OF.

his heirs, and a continuance of possession by them, then the operation of the statute would commence, it seems, from the entry by the landlord or ancestor. *Ibid.*

8. On a note payable on demand, the maker is bound to pay immediately, and is not entitled to days of grace. The holder may sue on the same day the note is made. Any other demand than by suit is unnecessary. Whenever the plaintiff may sue the defendant, a cause of action may be said to *have accrued* to him, and from that time the statute of limitations begins to run; consequently, upon a note payable on demand, the statute commences from the date, if it have one, and if without date, from its *delivery*. *Smith v. Bythewood*. 245.
9. Action of assumpsit. Plea statute of limitations. Replication that defendant was out of the State at the time the cause of action accrued against him, and that the suit was brought within two years after the defendant's return to the State. The judge below nonsuited the plaintiff on the ground, that his cause of action was barred by the statute, there being no saving in the statute as to absent defendants. Nonsuit set aside and new trial granted. (The judges all concurring in granting a new trial, but delivering separate opinions.) *Smith v. Mitchell*. 316.
10. Although our act of limitations of 1712, (P. L. 102,) requires all actions of account, upon the case, &c., to be brought "within four years next after the cause of such actions, or suits, and not after;" and contains in itself no express saving, or exception, as to causes against persons out of the State, at the time such causes of action may accrue against them; yet upon the construction of the whole act, HELD, that when such a cause of action accrues to a plaintiff, resident in this State, against a party residing out of the State at the time, the statute does not begin to run until his return within the jurisdiction of the courts of this State. (Per Richardson, J., in delivering the opinion of the court.—Butler, J., concurring.) *Ibid.*
11. By the stat. 4 Ann, Ch. 16, s. 19, (P. L. 96,) it is enacted, "That if any persons against whom there is, or shall be, any such suit or cause of action, &c., (*action of account, or upon the case, &c.*) he or she shall be at the time of any such cause of suit, &c., given or accrued, &c., *beyond the seas*, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before, by this act, and by the said other act, made in the twenty-first year of the reign of James the first." The statute of Anne was enacted in 1705, and was made of force contemporaneously with the passage of our act of limitations of 1712, which last act was copied from and substituted, with alterations, for that of the twenty-first year of James the first. HELD, that although the saving as to parties beyond seas, in the statute of Anne, is refer-

LIMITATIONS STATUTE OF.

able *in terms*, only to that statute and the statute of the twenty-first year of James the first; yet by a fair and liberal construction, it may be considered as applicable to the act of limitations of 1712. (Per Richardson, J., in delivering the opinion of the court.—Butler, J., concurring. *Ibid.*

12. Our statute of limitations was passed on the twelfth day of December, 1712, and the act for declaring of force certain English statutes, was passed on the same day. Among the statutes declared of force, is the statute of 4 Anne, c. 16.—By the nineteenth section of that statute, it is declared in substance, that if the defendant, when the cause of action accrued, be beyond seas, he may be sued after his return, within the time fixed by the statute of the twenty-first year of James I., which is six years. The statute of James is not of force, and the time allowed for bringing actions of assumpsit by our act, is only four years. In every other respect, there is no repugnancy between our act of 1712, and the nineteenth section of the statute of the fourth of Anne, c. 16. As they were both declared to be the law of the State on the same day, they must be regarded as parts of one system, and construed together, so far as they are consistent. The action in this case was brought within two years after the defendant's return to the State, and the question whether he is allowed four or six years, does not arise. (Per Evans, J.—Earle and O'Neill, Js., concurring.) *Ibid.*

See GUARANTY, 2, 3.

LOST NOTE. See EVIDENCE, 12.

LOUISVILLE, CINCINNATI AND CHARLESTON RAIL ROAD COMPANY.

1. The 35 § of the act of 1835, (acts of 1835, p. 54,) incorporating the Louisville, Cincinnati and Charleston Rail Road Company, provides, "that where any lands or right of way may be required by the said company, for the purpose of constructing their road, and for want of *agreement* as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, *the same may be taken* at a valuation to be made by commissioners," &c. HELD, to be constitutional. *The Louisville, Cincinnati and Charleston Rail Road Company v. Chappell. Same v. Reese.* 383.
2. All the writers upon the fundamental principles of national societies agree, and it has now become a principle of universal law, that *private property*, whether real or personal, may be taken for *public use*, upon just compensation to the owner. This doctrine has been uniformly recognised in this State. See the cases of Lindsay v. Comm'rs, 2 Bay, 38; Ford v. Whitaker, 1 N. & M'Cord, 5; M'Gowen v. Starke, 1 N. & M'Cord, 387; Comm'rs v. Singleton, 2 N. & M'Cord, 528;

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Eaves v. Terry, 4 M'Cord, 125 ; and **State v. Dawson**, Riley's Coll, 103. *Ibid.*

3. The exercise of such a power belongs to the *eminent domain* of the State, and it devolves upon the legislature to decide in regard to great works of improvement, whether the public benefit is of sufficient importance to justify the exercise of the *eminent domain* in such cases. *Ibid.*
4. And the only restriction is, that private property cannot be *taken*, without just compensation to the owner. *Ibid.*
5. *The exercise of this power* in relation to the Louisville, Cincinnati and Charleston Rail Road, is to be found in the authority conferred in the *charter* upon the company to lay out and construct a road between the given *termini*: and in the actual construction of the road the company are to be considered *so far* the mere authorised agents of the State, to execute the power conferred. *Ibid.*
6. The Louisville, Cincinnati and Charleston Rail Road is to be considered as a *great public improvement*, and when made, a *public highway*, and the legislature may appropriate *private property* for such improvement, or authorise a corporation *thus* to appropriate it, upon full compensation to the owner. *Ibid.*
7. The 37th clause of the act of incorporation, provides a full and ample mode of compensation to the land owner for any loss or damage he may sustain by the company, in taking his property, in which the trial by jury is preserved, and which constitutes the proper tribunal for the decision of such questions. *Ibid.*

LUNATICS.

1. The old rule was, that a party could not stultify himself ; but it is now subject to many modifications, and it may now generally be stated, that if a party sought to be charged with a contract, can show that he was so devoid of understanding as to be *utterly* incapable of understanding it, he is not bound by it. *M'Creight v. Aiken.* 56.
2. Proceedings in the court of equity, establishing the lunacy of the plaintiff, are admissible to prove the lunacy of the plaintiff, in an action at law by him against a third person not a party to the proceedings. *Ibid.*
3. In chancery, the rule of practice is uniform, that where the committee of a *lunatic*, sue for any thing in the right of the lunatic, the committee, as well as the lunatic, must be made parties. In suits at law, the rule is otherwise. There, the action must be brought in the name of the lunatic *alone*, if of full age ; and if under age, by guardian. So, in the case of a *lunatic defendant*, if he be within age, he must appear by *guardian* ; and if not of full age, by *attorney*.—*Ibid.*

MALICIOUS PROSECUTION. See ACTION ON THE CASE, 1, 2, 3, 4.

MORTGAGE. See AGREEMENT, 1.

MOULTRIEVILLE.

1. In the act incorporating the village of Moultrieville, the power of making bye-laws is conferred on the Town Council. The act further provides, "that the said Town Council may affix fines for offences against their bye-laws, and appropriate the same to the public uses of the island ; but no fine shall exceed twenty pounds sterling for any *one offence* ; which fines, where they exceed five pounds sterling, may be recovered in the Court of Common Pleas in Charleston, and when under the sum of £5, before the Intendant and Wardens, or any two of them." *The State ex relatione David Truesdale v. The Town Council of Moultrieville.* 158.
2. An ordinance of the town council provides, "that from and after the passing of this ordinance, it shall not be lawful for any person or persons, at any time to cut down and make use of the cedars, or other trees, on the east end of the island, known as the 'myrtles,' for posts, ship timber, or for any other purposes whatsoever, except for fascines to resist the encroachment of the sea : any person, or persons, offending in the same, shall forfeit and pay for *each and every* offence, to the use of the corporation, the sum of \$5, to be recovered before the Intendant and Wardens." *Ibid.*
3. The relator in one proceeding before the Intendant and a Warden, and by one judgment, had been convicted of forty different offences under this ordinance and fined \$5 for each offence, making an aggregate of \$200 ; each offence being supposed to consist in each tree by him cut down. *Ibid.*
4. The specification of the relators offence was, "that he *cut down* at various times, a cedar tree, and did from time to time continue cutting down the same, until he committed one hundred violations of the ordinance aforesaid, by cutting down one hundred trees." HELD insufficient in not setting out that the relator "made use of the cedars," by him cut down, as the offence under the ordinance does not consist merely in cutting down, but in cutting down and making use of the trees. *Ibid.*
5. The matter as charged in this specification, amounts to no more than a *single offence*, for it may well be that every tree cut down by the relator, of which he stood convicted, were cut on one day, and under the ordinance the cutting down more trees than one, *at one time*, would be but *one offence*. *Ibid.*
6. Under the act of incorporation above referred to, the town council had no power by *one* judgment to fine for more than £5. This is limited by the act, and according to its very words, "where the fines exceed £5, they are to be recovered in the Court of Common Pleas

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for Charleston." In this case, the fines imposed and about to be collected under the warrant of the town council, are far beyond the sum thus limited. It will not do to say they are for separate offences.—They are imposed at one sitting, and for offences anterior to it, and thus make an aggregate of fines incurred by the party beyond £5, and one therefore, according to the charter, to be sued for and collected in another jurisdiction. Prohibition ordered. *Ibid.*

MURDER OF A SLAVE. See INDICTMENT, 9, 10, 11.

NEGROES AND PERSONS OF COLOUR. See RETAILING, 1, 2, 3, 4. SLAVES, 1.

NEW TRIAL.

1. Upon an indictment against the defendant, the proprietor of a licensed grocery, No. 3, in the city of Charleston, for selling liquor to a slave, the proof was that the liquor was sold by the clerk of the defendant in his absence; and as far as it appeared by any *express* evidence, without his authority. The jury found the defendant guilty. Under the peculiar circumstances of the case, the clerk having been already punished for the same act—the court granted a new trial. *State v. Bohles.* 145.
2. The questions of competency to make a will and of undue influence in procuring a will to be made, where there is no exception to the instructions of the judge, or other legal objection, are questions of fact for the jury, and their verdict will not be disturbed. *Tillman et al. v. Hatcher.* 271.
3. The subsequent discovery of written documents, *important to the issue*, and either unknown before or entirely out of the reach of the party offering them, has been *it seems, sometimes*, though *rarely*, held a *sufficient* ground for a *new trial*; but *never* where the party might by due diligence have procured them before the trial. *Ibid.*
4. On the trial of an issue in the circuit court, made up on an appeal from the ordinary, involving the competency of the testatrix to make a will, and the question of undue influence in procuring the will to be made, many witnesses were examined, and the testimony was conflicting. The jury found a verdict for the appellants, disaffirming the will. The executor, the appellee, moved this court for a new trial, among other grounds, upon the *discovery* since the trial of the case, of an older will of the testatrix than the one *in question*, among *his own* papers. HELD insufficient, and no ground for a new trial.—*Ibid.*
5. Where a witness swears without any knowledge or consciousness of interest in the cause, and without any objection on that account at the trial, the discovery of a document, or other evidence, *afterwards*,

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which goes to show that the witness was in *fact* interested, does not furnish in itself any ground for a new trial. *Ibid.*

NONSUIT. See PRACTICE, 1, 2, 3, 4, 5, 6.

ORDINANCE. See ANDERSON. MOULTRIEVILLE.

ORDINARY.

1. On an appeal to the Court of Common Pleas, from the decision of a Court of Ordinary, establishing a will, the correct practice is for the appellants to file a suggestion, setting forth the proceedings in the Ordinary's Court, and then to assign, specifically, the supposed errors in the judgment of that court. *Southerlin et al. v. M'Kinney et al.* 35.
2. In such a case, the appellants, who are regarded as the actors and affirmants of the truth of the issues before the court, are bound to open the case, and are entitled to the reply in evidence and argument.—(S. P. Tillman et al. v. Hatcher, 271). *Ibid.*
3. Amendments should, in general, be allowed where they do not operate to delay or prejudice the other party; but even then it is not usual to allow them, except in cases of surprise or accident. Nothing of that kind being pretended in this case, the motion to amend was properly refused. *Ibid.*
4. The act of 1789, (P. L. 482,) in relation to granting administration, applies to cases where the executors of a will are dead, or refuse to qualify, as well as to cases of intestacy. *Smith v. Wingo.* 287.
5. By that act, the ordinary is compelled to grant administration in the order prescribed. The grandson of a deceased testator is, in a class, preferred to mere next of kin; of these last, in a case of intestacy, such as may be entitled to a distributive share, would be entitled to administration; but this provision does not apply where there is a will. *Ibid.*
6. In the case of the next of kin, as a class entitled to administration, the ordinary may select one, preferring among them (as he most probably would) he who has an interest under the will. *Ibid.*
7. But as against a stranger, any of the enumerated persons in the statute are entitled to preference, and the ordinary would be bound to commit administration accordingly. *Ibid.*
8. According to the case of Thompson v. Huchet, 2 Hill 347, the ordinary, at the instance of any of the parties enumerated in the statute as entitled to administration, would be bound to revoke an administration committed to a stranger and grant it to the applicant. *Ibid.*
9. The creditors of a deceased debtor, whether by judgment, bond, or simple contract, must, for the collection of their debts, proceed against

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the executor or administrator of their debtor. They have no right at law to claim payment from any one else, unless it may be that in the case of a bond-debt, a recovery might be had against the heirs, on account of real estate descended. In equity, the rule is also *uniform*, that the executor or administrator of the debtor, must be a party. *Easterling (Ordinary) v. Thompson.* 346.

10. The ordinary, in making up the accounts of an administrator at the instance of a creditor, cannot do so unless he has the proper parties before him: upon the death of an administrator, his administrator is not accountable to the creditors of the first intestate; against him they have no right of action. Their remedy is against the *administrator de bonis non* of the first intestate, whose duty it is to have an account from the administrator of the administrator. *Ibid.*
11. During the life time of the administrator of an intestate, the creditors of the intestate have a right to claim an account from him. On his death, their remedy directly against him is gone. It is only through an *administrator de bonis non* of the *first intestate*, they can have an account: for at law, or before the ordinary, the administrator *de bonis non* of the *first intestate*, is the only party entitled to demand the account. In *equity*, the creditors of the first intestate, by making the administrator *de bonis non* of such intestate and the administrator of the *first* administrator, parties, might claim and have, *it seems*, an account of both administrations. *Ibid.*
12. On an appeal from a decree of the ordinary, making the administrator of an estate liable for the amount of a debt lost by his want of diligence: **HELD**, that the liability of the administrator upon the facts reported by the ordinary, was a conclusion of *law*, proper for the court, and not a question of fact to be submitted to a jury. *Jennings et al. v. Weeks.* 452.
13. The administrator of an estate held the note of a third person given to the intestate, which fell due on the first of January, 1823. The writ on which judgment was obtained, did not issue until October, 1826, nearly four years afterward, in the meantime the party became insolvent. **HELD**, that the decree of the ordinary, charging the administrator with the amount of the debt, as having been lost by his laches, was correct, and properly affirmed by the circuit court. *Ibid.*
14. The act of 1799 provides for the right of appeal from the ordinary to the circuit court, and is not limited to any specific classes of cases. The circuit courts are required to hear such appeals, "and all matters of fact shall be tried by a jury." There seems to be no sufficient reason for saying that the right of jury trial in such cases, shall be restricted solely to questions of *devisavit vel non*. *Ibid.*
15. The correct course of practice, on appeals from the ordinary, indicated. *Ibid.*

PARTITION. See **TRESPASS TO TRY TITLE**, 10, 11, 12, 13, 14.

PARTNERSHIP.

Though a debt due by one partner cannot be set off against a demand due to the partnership, yet when one is indebted to a partnership, and during the existence of it delivers flour, bacon, or other articles, to *one* of the partners, which it is understood between them shall be received in payment of the partnership demand, the debtor is discharged on the ground of *payment*; and the circumstance that the articles were applied to the individual use of the partner receiving them, does not vary the case. *M'Kee et al. v. Stroup.* 291.

PAYMENT. See **AGREEMENT**, 1. **PARTNERSHIP**,

PERJURY. See **ACTION ON THE CASE**, 6, 7.

PILOT. See **INSURANCE**, 1, 2.

PLEADING.

1. In an action of malicious prosecution, the declaration charged that the defendant contriving and maliciously intending to injure the plaintiff, &c., *procured one F. C. Ruff*, to appear before the defendant, a justice of the peace, and falsely and maliciously, and without any reasonable or probable cause whatever, to make oath, &c. HELD sufficient after verdict. *Perdu v. Connerly.* 48.
2. In the above allegation, the act done by Ruff is charged to have been false and malicious, and without probable cause, and to have been *procured* to be thus done by the defendant maliciously; the defendant is liable for Ruff's act as done by his *procurement.* *Ibid.*
3. If it were necessary to allege in this case that the defendant knew that Ruff had no reasonable or probable cause for the charge, this is in effect done when the defendant is charged with having of his malice, *procured* a false and groundless charge to be made; and if defective is aided after verdict. *Ibid.*
4. The general rule of pleading is, that all the circumstances necessary for the support of the action should be stated in the declaration; and in an action against one for instituting a groundless and malicious prosecution, through the *agency* of a third person, the averments, 1st, of the agency of the defendant in causing such third person to make a *false charge*; 2d, the charge thus made; 3d, the arrest of the defendant, his commitment, or enlargement on bail, to answer the charge; 4th, the presentation of the bill to the grand jury and their action upon it; and 5th, the discharge of the plaintiff, and that the prosecution was thus ended, are all that are necessary, and are sufficient. *Ibid.*

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- 5 In chancery the rule of practice is uniform, that where the committee of a lunatic sue for any thing in the right of the lunatic, the committee, as well as the lunatic, must be made parties. In suits at law, the rule is otherwise. There the action must be brought in the name of the lunatic *alone*, if of full age, and if under age by guardian. So in the case of a *lunatic defendant*, if he be within age, he must appear by *guardian*; if of full age by *attorney*. *M'Creight v. Aiken*. 56.
6. In an action of trespass *quare clausum fregit*, the defendant may justify his entry on the land under the plea of the *general issue*, by showing *title* in himself to the freehold. *Muldrow et al. ads. Jones*. 64.
7. In a declaration against an indorser, a variance in setting out the name of the maker of the note, from that upon the note offered in evidence, would be fatal. But where the declaration, which was not very legibly written, in some places described the maker's name as "Logan," (the true name,) and in other places it seemed more like "Ligan," the court HELD, that it was to be presumed that the attorney who drew the declaration knew the true name, and that as he had in some places put the name correctly, they would not scrutinize too strictly, in order to turn a party out of court, and that the cause of action was sufficiently set out to be a bar to another suit for the same cause.—*Holt v. Salmon & Stroud*. 91.
8. By a law of the State of Georgia, demand and notice are dispensed with, and the liability of the indorser of a note is made an absolute and not a conditional one. The declaration set out the making of the note, the indorsement by the defendants, *demand* and notice, and alleged that the defendants became liable to pay, &c. HELD, sufficient in reference to the law of Georgia, and that the allegation of *demand and notice*, though unnecessary, did not vitiate the declaration, but might be rejected as surplussage. *Ibid.*

See ACTION ON THE CASE, 5, 6, 7. AMENDMENT. AWARD, 1, 2. EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 4, 5, 6, 7, 8, 11.

POWER TO SELL LANDS. See DEVISE, 1, 2, 3.

PRACTICE.

1. In a joint action of trespass, assault and battery, against two defendants, the plaintiff having failed, on the trial, to make out any case against one, on the motion of the defendant's counsel, a nonsuit was entered as to him, and he was examined as a witness for the other defendant, against whom the plaintiff obtained a verdict, upon which he signed judgment and issued execution. The other defendant entered up a judgment of nonsuit and issued execution for his costs. At a subsequent term, the defendant against whom the verdict had been obtained, made an application to set aside the verdict, judgment and execution against him, on the ground, that in a joint action against several, the plaintiff cannot be nonsuited by one defendant without

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the others, and that the plaintiff, in this case, having been nonsuited as to one defendant, this was a legal discharge as to the other defendant. Motion refused. *M'Donald v. Ivy.* 95.

2. If the order of nonsuit, obtained by *one of the defendants* in this case, operated in law as a discharge of *the other* defendant, the obvious and proper course was, to claim the benefit of it at the moment, either by making a motion for nonsuit in the case of the other defendant, on the ground that if the plaintiff be *called* as to one, he is called as to all; or, by asking leave to plead it in bar of the action, as a legal discharge. *Ibid.*
3. The practice both here and in England, is to grant relief on motion or rule to show cause, in many cases, where formerly the party would have been driven to his *audita querela*, or to his writ of error; but in neither of these modes would the party be allowed to reverse a judgment, or to set aside a verdict for any matter of exception on the score of irregularity, or any matter of discharge in point of law, which not only existed, but was fully apparent and within his knowledge at the time. *Ibid.*
4. It would be an extraordinary proceeding, if after having, at the defendant's instance, granted his motion to nonsuit the plaintiff as to one of the defendants, in order to make him a witness for the other, the court should deprive the plaintiff of the benefit of his verdict, even supposing the irregularity to exist; and inasmuch as the defendant did not avail himself of it, but proceeded in the trial, if it were necessary to preserve the symmetry of the record, the court would rather grant a rule to set aside the judgment of nonsuit, and send the other defendant also to a jury. *Ibid.*
5. Had the defendant attempted to avail himself of the nonsuit as to the other defendant, at the trial of the case against himself, the court would, of course, if the objection were deemed valid, have *then* set aside the judgment of nonsuit, and put the case to the jury. *Ibid.*
6. According to the English rule of practice, which is the correct one, in a joint action against several defendants, the plaintiff must be nonsuited as to all or none; so if the plaintiff has obtained a judgment by default, (or otherwise,) against one defendant, he cannot be nonsuited by another defendant; but upon an issue in fact, the case must go to the jury as to him. *Ibid.*
7. The general rule as to the *reply* is, if the defendant adduce any evidence the plaintiff's counsel is entitled as of right to the reply. In this case the defendant's counsel *called back the plaintiff's witness*, after the plaintiff had closed his case, to prove his defence. *Held*, that the plaintiff was entitled to the reply. *Hagood v. Cathcart.* 262.
8. In making a motion to the court for leave to file a suggestion to set aside a judgment as fraudulent, it is not necessary for the promovent to serve the opposite party with affidavits of the facts upon which

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his motion is founded, at the time the notice of the intended motion is served, nor at any time previously to making the motion; nor is it necessary in such a case to take out a rule *nisi*. *Hatch et al. v. Clark*. 268.

9. In general, when a rule *nisi* is applied for, affidavits are not required; but they must be produced and filed *when* the party makes his motion to make the rule absolute. So where a party has given reasonable notice of the *grounds* upon which he intends to make his motion, he has done all that he could or need have done *by rule*. *When* the motion is made, the plaintiff should make a satisfactory showing to the judge, by *affidavit*, of its reasonableness and justice. *Ibid*.
10. A suggestion against a confession of judgment as fraudulent, "can only be filed by leave of the court on *cause* shown, creating a reasonable ground to believe that the confession is fraudulent, and upon such conditions as the court may impose." (S. P. Underwood v. Posey, 1 Hill. 266.) *Ibid*.
11. There is nothing in the act of 1769, (P. L. 270,) creating the *summary process* jurisdiction of the court of common pleas, and providing among other things, that in "such suit the plaintiff and defendant shall have the benefit of all matters, in the same manner as if the suit was commenced in the ordinary forms of common law or equity," nor in the 34th rule of court, prescribing the terms upon which either party may have a *discovery* under this clause of the act, which favors the idea that the discovery to be obtained under it, can be demanded in a case where the court of equity would refuse it. *Holly v. Thurston*. 282.
12. Where the plea of the statute of limitations was interposed by the defendant to the plaintiff's account, in a summary process, an interrogatory, seeking to discover from the defendant, whether he had not, since and when, promised to pay the plaintiff's account, was HELD incompetent and irregular, and that the defendant was not bound to answer the same. *Ibid*.

See APPEALS, 1, 2, 3, 4, 5, 6. AWARD, 1, 2, 3.

PRINCIPAL AND AGENT.

1. The vendor of a negro slave, though he sell as the *agent* merely of the owner, and without any *express* warranty, is liable to the purchaser upon the *implied* warranty of soundness, where he has received notice of the unsoundness and the negro has been tendered back to him before he has paid over the purchase money to his principal. And in such a case, a count for *money had and received* will be sufficient. *Parkerson v. Dinkins*. 185.
2. Mrs. G., a feme sole employed one King as an agent to retain counsel for the prosecution of her claim to some lands in Georgia, and for the purpose of enabling him to do so, gave her note to the agent,

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payable to himself or order. King afterwards sold the note to one Lawton; and Mrs. G. intermarried with one Clark, (her co-plaintiff in this action,) who demanded the money from the defendant. **HELD**, 1, that the defendant, by selling the note to Lawton, had turned it into money, and that as soon as he did this, it became money in his hands belonging to Mrs. C., to be applied to her use in carrying on her suit in Georgia. 2. That when her husband C. revoked the power originally conferred, and demanded the money from the defendant, he was bound to pay it, or account for the application of it. 3. That the plaintiffs were entitled to recover the amount of the note on a count for *money had and received*. 4. That they were entitled to recover without proof on their part, that the defendant had *not* employed counsel in pursuance of the agreement under which the note was given. *Clark & Wife v. King*. 178.

3. Defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston; and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. One *Howzer* was the master or patroon of the boat, and the *general* habit was, for those who wished to send their cotton by the defendant's boat, to apply to the defendant *himself*. On this occasion, the patroon had been told to take Col. Goodwyn's and Mr. Dallas' cotton, which he had done, when the plaintiff applied to Howzer, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant himself; to which Howzer replied, he thought not, and received the cotton. **HELD**, that under the circumstances, the defendant was bound by the act of *Howzer*, as being within the general scope of the authority conferred upon him by placing him in the situation of master of the boat, and that defendant was consequently chargeable as a *common carrier*. *M'Clure v. Richardson*. 215.

PRINCIPAL AND SURETY.

1. In the case of *co-sureties*, who pay the debt of their principal, the general rule is, that each must sue for the amount paid by himself; and if they were to join, their interest generally being several, they would fail. But, where the debt of the principal has been paid out of a *joint fund*, or by the *joint credit* of the sureties, then, the payment being a joint act and creating a joint interest, they may sustain an action against the principal, in their joint names. *Stewart & Cooper v. Vaughan*. 33.
2. Where *co-sureties* pay the debt of their principal, by their *joint* and *several* note, such payment is equivalent to a payment by a common fund, or *money*, belonging to both, and gives a joint right of action to *both*, against the principal, to recover over from him the amount so paid. *Ibid*.

PROHIBITION. See JURISDICTION.

RAIL ROAD. See LOUISVILLE, CINCINNATI AND CHARLESTON RAIL ROAD COMPANY.

RELEASE. See AGREEMENT, 1.

REMAINDER.

1. In this State, as well as in England, a feoffment, with livery of seisin by the tenant for life of the legal estate, will bar all contingent remainders ; and the rule is not modified by the circumstance, that the remainder man is an infant. *Redfern v. Ex'ors of Middleton ; Same v. Hamilton ; Kinloch v. Ex'ors of Middleton ; Same v. Hamilton ; Dehon v. Redfern.* 459.
2. A feoffment so made, together with a release of the right of entry and action by the person next entitled in remainder or reversion, HELD, to be such a title as a purchaser is bound at law to accept. *Ibid.*

REPLY. See APPEALS, 1, 2 ; PRACTICE, 7.

RETAILING ; SELLING LIQUOR TO A SLAVE ; AND ILLEGAL TRAFFIC WITH SLAVES.

1. Upon an indictment against the defendant, the proprietor of a licensed grocery No. 3, in the City of Charleston, for selling liquor to a slave ; the proof was, that the liquor was sold by the clerk of the defendant, in his absence : and as far as it appeared by any *express* evidence, without his authority. The jury found the defendant guilty. Under the peculiar circumstances of the case—the clerk having been already punished for the same act—the court granted a new trial. *State v. Bohles.* 145.
2. The rule of evidence, established by the 5th section of the act of 1834, p. 14, in relation to illegal traffic with slaves, applies only, it seems, to cases arising under the act of 1817. *State v. Stone.* 147.
3. Though the act of 1834, *as to vendors* of liquors, &c. may be considered as repealing the penal provisions of the act of 1817 ; yet the rule of evidence established by the act of 1817, (which requires the defendant to produce and prove the written permission of the owner or employer, to deal, trade or traffic,) remains in full force, and applies to indictments under the act of 1834. *Ibid.*
4. Where a man is charged with a crime and does not deny it, a jury is warranted (especially in connection with other strong circumstances) in finding a verdict of guilty. *Ibid.*

RIOT.

1. Indictments for Riot—motion in arrest of judgment. The indictment charged in substance, “ that the defendants unlawfully, riotously, and

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routously assembled together to disturb the peace of the State, and being so assembled, did make great noise, riot, tumult and disturbance, for a long space of time, to the great terror and disturbance of the people," &c. HELD conformable to the precedents in such cases, and sufficient. Motion refused. *The State v. Wm. Brazil, Wm. Griffin, Jas. M'Echerin et al.*; *The Same v. Wm. Brazil, Eli Beach et al.*; *The Same v. L. B. Bowie, Hugh Miller, J. M'Echerin et al.* 257.

2. Where an indictment for a riot charged that the two defendants, who were named, with divers other persons, *to the jurors unknown*, to the number of ten did assemble, &c., HELD sufficient to sustain a verdict of guilty against the two defendants, who were tried and convicted. It is not necessary to allege that a riot was committed by *three* persons named in the indictment. It is sufficient to name those who are known, and to allege that the others were *unknown*. *Ibid.*
3. On an indictment for a riot conformable to the usual precedents, after a general verdict of guilty, it is, it seems, wholly immaterial whether the facts proved establish that the defendants are guilty of a riot, rout, or *unlawful assembly*. They are kindred offences, and the greater includes the less. A general verdict of guilty, therefore, on an indictment for a riot will be supported, although the evidence establishes no more than an *unlawful assembly*. *Ibid.*
4. Where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols, or both, and marched backwards and forwards through the streets, shooting guns and blowing horns, to the terror and the alarm of the inhabitants, HELD, that the perpetrators were guilty of a riot, and a motion for a new trial refused. *Ibid.*
5. One of the persons indicted, though not proved to have been seen in the midst of the party, was seen coming from where they were assembled, in a state of intoxication, with a pistol in each hand, and spoke of himself as the head of the mob; HELD, sufficient evidence to sustain a verdict of guilty against him. *Ibid.*

RIVERS.

1. The plaintiff had constructed a fishery consisting of several fish traps, on a line between the adjacent islands in the Congaree river, at a distance of eighty or ninety yards with the customary dam; having obtained the permission of the proprietor to use the shores of the islands for that purpose. The defendants, professing to be performing their duty as commissioners of fish sluices on Broad River, cut away and destroyed one of the traps, and thereby opened a sluice which rendered the traps of no value. HELD, that an action of trespass vi et armis, would lie for the injury—and plaintiff having obtained a verdict, a new trial was refused. *Boatwright v. Bookman et al.* 447.

RIVERS.

2. The right of fishery in the public *navigable* rivers of this State, considered at length and recognised. *Ibid.*

ROADS PRIVATE. See WAY.

SALE OF LANDS AND CHATTELS.

1. In an action on a note for the purchase money of a negro slave, the vendor's title to which was warranted on the sale, the defendants set up, by way of discount, certain defects in the title, and claimed an abatement of the price. The supposed defects depended upon many contingencies; no loss to the defendants had occurred, and it was uncertain whether any injury *would* ever result to them on that account. The defendants, with a full knowledge of the defects in the title, after the *first* note given for the purchase money fell due, made an arrangement with the plaintiff, giving him a new note by way of renewal, payable in a year after, with interest, (which was the note now sued on,) during all which negotiation no objection was made on the score of deficiency in the title. The jury found a verdict for the plaintiff, without allowing any abatement, and a new trial was refused. *Madison & Latimer* ads. *M'Cullough*. 38.
2. In the sale of personal property, (e. g. a negro slave,) where there is a warranty of title, the warranty stands as an indemnity against loss from any defect in the title of the *vendor*; and without loss there can be no claim for any abatement in the price of the thing sold, by *way of discount* in an action for the purchase money. *Ibid.*
3. The vendor of a negro slave, though he sell as the *agent* merely of the owner, and without any *express* warranty, is liable to the purchaser upon the *implied* warranty of soundness, where he has received notice of the unsoundness and the negro has been tendered back to him before he has paid over the purchase money to his principal. And in such a case, a count for *money had and received* will be sufficient. *Parkerson v. Dinkins*. 185.
4. *Deceit* committed by the vendor in the sale of property, like any other fraud, may have the effect to discharge the vendee entirely or partially, from the payment of the consideration money.—(S. P. *Adams v. Wylie*, 1 N. & M'Cord, 78.) *Johnson v. Wideman*. 325.
5. But *damages* arising from a *deceit* in the sale of property (e. g. a negro) cannot be set up by way of *discount*, in an action for the purchase money, so as to entitle the defendant to *recover damages* from the plaintiff. *Ibid.*
6. A verbal *condition* made on the transfer by delivery, of a personal chattel, under a contract of sale, *that the right of property* shall remain in the vendor or person transferring possession until the price agreed on be paid and not pass *absolutely* to the purchaser until then, is consistent with the rules of law, and will enable the vendor to

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maintain trover against an officer who sells the chattel, under process, as the property of the vendee in possession, at the suit of one who was a subsisting creditor of the vendee at the time of the transfer. (O'Neill and Butler, J., dissenting.) *Bennett v. Sims*. 421.

7. The cases of *Dupree v. Harrington*, Harp. R. 391; *Reeves v. Harris*, and *Bailey v. Jennings*, 1 Bail. R. 563; to the same point, commented on and their authority recognised by the court. (O'Neill and Butler, J., dissenting.) *Ibid*.
8. A bill of sale of a negro, in the usual form, contained a warranty in these words, "to have and to hold, all and singular, the said negro man George, and I do hereby bind myself, my heirs, executors, administrators and assigns, to forever *warrant* and defend the said negro unto the said Thomas Roseman," &c. HELD to be a *warranty of title* merely, and not of *soundness*. (O'Neill, J., dissenting.) *Roseman v. Hughey*. 437.

SHIPS AND SEAMEN.

1. Indictment under the act of 1836, (Acts, p. 60,) for harboring one F. C. Lenderman, a deserted seaman. By the shipping articles of the Bremen barque Elizabeth, Lenderman bound himself "to go in her as a seaman, from *Bremen* to *Baltimore*, and from *Baltimore* back again to *Bremen*, or any other place where our destiny may be, or the further voyages may go;" and that "he would not leave the ship out of the country, (from home,) nor demand his discharge, nor his wages that have not been received from a foreign tribunal." HELD, that by the articles, the vessel, after reaching her port of destination, might proceed to other ports before her return to Bremen; and that her coming from Baltimore to Charleston did not constitute such an unreasonable lengthening, either of the principal voyage contemplated, or its duration, as to render the contract void, or entitle the seaman to be discharged from the vessel. The seaman, Lenderman, being still bound to the vessel, and the defendant having been found guilty of harboring him while he deserted from the ship, the court refused to grant a new trial; two juries having found the defendant guilty on the evidence. *State v. Cordes*. 152.
2. Where the master fails to employ a *pilot* to navigate a vessel in coming into or leaving a port, where it is customary to do so, (as the port of Charleston,) and a loss happens in consequence of a pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured through the dangers, to avoid which a *pilot* is usually employed, and the loss happens at a point beyond which the pilot's services ceases to be necessary, the assured would be entitled to recover. *M'Millan & Ewart v. The Union Insurance Company*. 248.
3. It is an error to consider the employment of a pilot, in coming into or leaving a port, as a part of the seaworthiness of the vessel; nothing

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can enter into that which is not for the whole voyage. The business of a *pilot* is merely *temporary*. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally. Under such circumstances, it would be an abuse of terms to say, that a competent pilot was necessary to make a vessel *seaworthy*. The true principle seems to be, that if a vessel, without a pilot, sustain injury in entering or leaving a harbor where it is customary to have a pilot, such injury does not come within the perils insured against. *It is not a peril of the sea*. It is a loss from the bad navigation of the vessel, and is to be set down to the fault of the *master*, and consequently the *owners* would be liable and not the *underwriters*. [Per O'Neall, J.] *Ibid*.

SHERIFF.

1. The Fee Bill of 1827, (Acts of 1827, p. 57,) provides that the sheriff "shall be entitled to charge for conveying prisoners from one district to another, for every mile, going and returning, *in addition to all necessary charges, six cents per mile*." These charges in the usual administration of justice, are not to be paid by the State, unless the defendant should be acquitted, or be unable to pay the same. But the conveying a prisoner under *habeas corpus*, from one district to another, is not in the usual administration of justice: when done at the instance of the prisoner, whether he be acquitted or convicted, he is bound to pay all *legal and proper charges* in that behalf. *Taggart (late Sheriff) v. Hutson*. 300.
2. By the words, *in addition to all necessary charges*, it is meant, that the sheriff may charge for all expenses which are necessary, in order to enable him properly and safely to convey the prisoner. Under this interpretation is included, not only the *money paid* by the sheriff for his own support and that of the prisoner in going to and returning from the place to which the prisoner is conveyed under a *habeas corpus* issued at his instance, but also *horse hire* and the *hire of a guard*. *Ibid*.
3. The legislature have *regulated* the number of the *guard* to be employed by the sheriff in the removal of prisoners, and the charges of the sheriff in this behalf, when chargeable to the State; and when the prisoner is conveyed at his own instance, he is bound to pay the same charges which the State might be compelled to pay, if he was conveyed at her instance. *Ibid*.

SLAVES.

Action of trover for fourteen slaves. One Broad, by his last will and testament, bequeathed certain slaves, with their "future issue and increase, to John R. Dangerfield," *in trust nevertheless*, and for this purpose only, that the said D., his executors and assigns, should *permit* and *suffer* the said slaves, &c., to *apply* and *appropriate* their time and

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labor to their own proper use and *behoof without the intermeddling or interference of any person or persons whomsoever*, further than might be necessary for their protection under the laws of this State, &c. The testator in his said will further says, "Then I give and bequeath all the rest, residue and remainder, of my estate, both real and personal, to my said friend D. and his heirs and assigns forever; upon trust, nevertheless, and for this purpose only, that the said slaves above mentioned, &c. be permitted and suffered to use and enjoy the said estate, whether real or personal, *forever*, without the interference or meddling of the said D., or any person or persons whomsoever, further than may be necessary to secure to the said slaves the full use and enjoyment of the estate above mentioned." B. died, and the slaves above mentioned came into and continued in the possession of Dangerfield, when the plaintiff through and with her agent S., undertook to seize the slaves, as being liable to seizure *under the act of 1800*—and were about to carry them off. The defendant D., under the advice and with the countenance, and perhaps the co-operation of the other defendant F., resisted the seizure of the slaves, and the plaintiff desisted and went off without them: upon which she brought this action of trover. On the trial below, the Judge gave the following instructions to the jury: 1. "That the effect of Broad's will was clearly to vest in his executor, Dangerfield, the *legal* title to his estate. That at the testator's death, the executor had a right to take possession of the property and use it for the purpose of paying the debts of the estate, and then to do with it as he pleased; whether he would have acted in good faith in appropriating it to himself, instead of obeying strictly the directions of the will, was a question upon which a *court of law* would not undertake to decide. 2. That if the executor gave up the *practical dominion* and control of the negroes, and left them to their own government, they were liable to seizure under the act of 1800. Assuming that the negroes were liable to seizure, upon the question whether the plaintiff acquired a legal title to the negroes by seizure, the judge stated to the jury that the question presented itself in three points of view: 1. Did the plaintiff have an actual tangible possession of the negroes? 2. Did she so far subjugate them to her power and control, as to make them virtually her prisoners? 3. Had the negroes voluntarily surrendered themselves as captives to be taken to Charleston, under S's proclamation that they must go? The jury were instructed if they should come to an affirmative conclusion on either of these propositions, to find for the plaintiff. The jury found for the defendants, and a motion for a new trial was refused. *Rhame v. Ferguson et al.* 196.

See INDICTMENT, 9, 10, 11; RETAILING, 1, 2, 3, 4.

STATUTE OF LIMITATIONS. See LIMITATIONS STATUTE OF

SUMMARY PROCESS. See JURISDICTION, 9; PRACTICE, 11, 12.

TRESPASS. See FISH AND FISHERY, 1, 2; PRACTICE, 1, 2, 3, 4, 5, 6.

TRESPASS QUARE CLAUSUM FREGIT.

1. If a person having a possessory title to land enters by *force*, and turns out a person who has a naked possession only, the latter cannot maintain *trespass* against the person so entering under *color of title*; and if a person having a legal right of entry on land, enters by force, though he may be *indicted* for a breach of the peace, yet he is not liable to a private action of trespass for damages at the suit of the person who has no right, and is turned out of possession. *Muldrow et al ads. Jones.* 64.
2. In an action of trespass *quare clausum fregit*, the defendant may justify his entry upon the land, under the plea of the *general issue*, by showing *title* in himself to the freehold. *Ibid.*
3. The action of trespass, *quare clausum fregit*, is the appropriate action for a violation of the plaintiff's possession of lands. If he be in the *actual occupancy*, he can maintain the action *without title*. If his possession be *constructive* only, and not actual, he cannot maintain it without proof of title. *Johnson v. M'Ilwain.* 368.

See TRESPASS TO TRY TITLE.

TRESPASS TO TRY TITLE.

1. Under the statutes of limitations, of 1712 and 1824, (P. L. 101, a. a. 1824, p. 24,) the settled construction is, that the right or title to lands, and the consequent remedy by action for an injury to the same, by withholding the possession, can only be barred by an actual *pedis possessio*, for the time fixed by the acts. The reason of this seems to be, that until there is an actual permanent possession by some claimant, the party to whom the *right or title* to the land accrued, cannot prosecute it. *King v. Smith.* 10.
2. The principle that an actual possession of a part of a tract of land, by *color of title*, for more than five years, under the act of 1712, would bar the right of a claimant to prosecute the same, has been irrevocably settled since the case of *Reid v. Eifert*, reported in a note to 1 N. & M'Cord's Rep. 374: The subsequent cases on this subject reviewed. These cases clearly show that the operation of the act of limitations depends upon an actual possession of the land in dispute, and not upon a mere *non claim* by the plaintiff. *Ibid.*
3. They also show that the plaintiff's right of action for the *locus in quo*, must have existed against *some one* for more than the time allowed by the law, or he cannot be barred. If, therefore, any one, before the defendant, had an actual possession for more than *five or ten years* (as the case may be,) it would bar the plaintiff as well as if it had been in the defendant. *Ibid.*

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4. But, *unconnected* possessions, *each* being for a shorter time than that limited by the statutes, but when joined together making *five* or *ten* years, cannot be united so as to bar the plaintiff. *Ibid.*
5. In actions of trespass to try title to lands, the bar of the statute of limitations can only be interposed to prevent the plaintiff from recovering where he has had a right of action against the defendant, or *some one*, for the *locus in quo*, for *five* or *ten* years, as the case may be, and has during that time failed to prosecute it. *Ibid.*
6. A defendant, who has been in possession of lands for a less time than the statutory period, cannot *unite* his possession with that of a previous tenant, from whom he purchased, in order to make out the five or ten years required by the statute, to bar the plaintiff's right of recovery; for, until that period has run out, they are both to be regarded, as it respects the true owner, as mere trespassers. A conveyance from the first to the second tenant, under such circumstances, conveys nothing. *Ibid.*
7. If both possessions could be referred to one entry, as in the case of landlord and tenant, or in the case of a descent from a *disseisor* to his heirs, and a continuance of possession by them, then the operation of the statute would commence, it seems, from the entry by the landlord or ancestor. *Ibid.*
8. Trespass to try title. The plaintiffs were three out of five of the children and heirs at law of the late William Wagner, who died in January or February, 1813. The plaintiffs claimed under a *grant* to Robert Brown, for one hundred acres, dated 9th November, 1774. The land in dispute had been surveyed under a rule of court, by a deputy surveyor, who stated in his certificate that he had seen the land, and found it to be the same re-surveyed by Robert Bradford, 20th December, 1803; and that he believed it to be a part of the Brown grant. The next regular link in the plaintiff's chain of title, was a deed from Moses Westbury, dated 20th December, 1799, to one Carter. None of the witnesses knew Westbury; some of them said, that the reputation in the neighborhood was, that he married the only daughter of the grantee, Robert Brown, and that he and his wife removed from the State upwards of *thirty* years ago; probably about the date of this deed to Carter. There was no proof that either had been heard from since. The handwriting of a deceased witness to Westbury's deed was proved, and that the other witness to the same, who had made a mark, was also dead. The same witness proved that the body of the deed was in his (the witness') father's handwriting, who was dead: he also proved the probate to have been made before his father, who was a justice of the peace, and the certificate of registry, signed by Tutt, the clerk of Edgefield, who was dead. This deed conveys the land covered by the Brown grant. A deed from Carter to the late Wm. Wagner, for the same land, dated 18th January, 1802, was proved and given in evidence. The plaintiff

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gave in evidence a plat made by Robert Bradford, of the land in dispute, surveyed at the request of Carter, for Wm. Wagner, dated 20th December, 1803. The plaintiffs proved that the Brown grant was regarded by the neighborhood generally, as covering the land in dispute, and that the late William Wagner had more than five years actual possession prior to 1812, of a field of five, six, or seven acres, on the land in dispute. The defendant claimed under a junior grant to one Adams, dated June, 1786, covering the land in dispute, and deduced a regular paper title ; and proved that outside of the lines claimed by the plaintiffs, there had been a continual possession for more than forty years in the defendant, and those under whom he claimed. He proved too, that in the fall of 1811, Mr. Burnet, under whom he claims, dispossessed the tenant of William Wagner of the field of five or six acres, sowed, and reaped a crop of wheat from it. That Wagner was about ploughing up the wheat, in the spring of 1812, when he and Burnet met at the field : Burnet prevented him from doing so, and an arbitration (as it was called) took place, the whole matter about which, was ascertained from the recollection of two witnesses, who said that they were at the arbitration. That Lyon, Robertson and Bullock were the supposed arbitrators. One of the witnesses said that they looked at the papers, and said that the Adams title (that under which the defendant claims) was to hold until a better one. The other witness said, the understanding at and of the arbitration was, that Wagner's title would be good if he had Mrs. Westbury's title, otherwise the junior grant (the State title, as he called it) would be good : this was in the summer of 1812, and from that time to Wagner's death, in January or February, 1813, he was generally sick, and, some of the witnesses said, bed-ridden. Burnet hauled away in the summer of 1812, the rails from the field, and there had been no possession by any one since, of the land in dispute. The defendant also proved that the plaintiffs', William Wagner and his sister, Elizabeth Davis, asked leave, severally, to cut timber on the land in dispute, from the defendant ; and that he accordingly gave them leave. On this evidence, the jury were instructed by the circuit judge as follows : 1. " That the ordinary proof of location had not been resorted to, to locate the Brown grant, but still the evidence might satisfy them that it covered the *locus in quo*. That the survey by Bradford, made in 1803, under the title deduced from the grantee was evidence of the location of the Brown grant ; for there was no doubt, that plat covered the *locus in quo*. So, if they should be satisfied that Wagner, under the Brown grant, had possession, claiming by the boundaries of the Bradford survey, for more than five years, it would afford very satisfactory evidence of the location ; and that in a case of *this kind*, the circumstance proved by the defendant, in making out proof of the award (as it is called,) that it was the understanding among all concerned, that if Wagner had Mrs. Westbury's title he would be entitled to the land, might turn

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the scale in favor of the location contended for by the plaintiffs. 2. That if the plaintiff's title could be connected with Brown's grant, then he might be entitled to recover; otherwise not. That if the proof satisfied them that Mrs. Westbury was the daughter of Brown, and she and her husband were still alive, then her husband's deed being good for his or her lifetime, would entitle the plaintiffs to recover. If she survived her husband, then it would be that the plaintiffs had not entitled themselves to recover by the paper title. That if Mrs. Westbury was the daughter of Brown, the proof would justify the conclusion that she and her husband had been dead for thirty-two years; both having removed from the state, and not having been heard from since. The legal presumption of their death would be complete in 1806. If their death was thus to be presumed against their heirs, the statute would run out and be at an end in 1811, unless they were shown to be under disability, which was not done, and that the possession of Wagner, of 1806, 1807, 1808, 1809, 1810, 1811, would perfect his title against them. But the true view of the case was, to regard Wagner as having entered under Carter's and Westbury's conveyances, who, for aught that certainly appeared, might be strangers to Brown; but who had undertaken to convey his title, and under a title so derived, if he had an actual adverse possession of a part of the grant for more than five years before 1812, that this was equivalent to the most perfect conveyance of the Brown grant to him against all persons not laboring under some disability. That thus having the elder and better legal title, it was not divested by the supposed arbitration, or the asking leave from the defendant to cut timber on the land, by two of the plaintiffs. The fact of possession of more than five years before 1812, under Carter's and Westbury's deeds, and Bradford's plat, as connected with the title derived from Carter and the Brown grant, was distinctly submitted to the jury, and they were told that upon it would depend the case." The jury, under this charge, found a verdict for the plaintiffs for three-fifths of the land in dispute; and on a motion for a new trial, this court concurred fully in the instructions given by the judge below, to the jury, and refused the motion. *Wagner et al. v. Aiton.* 100.

9. In relation to the ground, questioning the sufficiency of the proof of Westbury's deed, the court say, "That it was all which could be given, and enough to establish the existence of the paper more than thirty years ago. But when it is remembered that, under the title derived from Westbury, there was a survey in 1803, and an actual *pedis possessio*, commencing in 1806, of more than five years, the proof was sufficient to admit Westbury's deed, (which was more than thirty years old,) as an ancient deed, without saying any thing about its execution." *Ibid.*

10. Trespass to try title. It was admitted on both sides that the title was perfect in *Jesse Smith*, deceased, in his life time—who was the

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father of both plaintiff and defendant, and under whom both claimed. The plaintiff, to make out his title, relied on the proceedings at law for the partition of the real estate of Jesse Smith among his heirs, an order for the sale of the lands, and an actual sale by the sheriff of the tract in dispute, at which he became the purchaser, and produced the sheriff's deed reciting the return of the commissioners, the order and the sale, dated 4th September, 1835. The original summons and writ in partition, and proceedings, were not produced, and on proof of their existence and loss, the plaintiff offered as *secondary evidence* the following entries in the sheriff's books and abstracts from the daily minutes of the court, corroborated by the testimony of the officers of the court and other witnesses: 1. Entry in the sheriff's books, 30th January, 1828, "J. Patterson and wife v. the heirs at law of Jesse Smith, summons in partition," The plaintiff and defendant were both parties, and were both served. Summons returned to the clerk. (The clerk deposed that he had made diligent search for the proceedings in partition, without having found them.) 2. In the minutes of the court for April term, 1828, an entry relative to the same matter, "on the return of the summons in partition, ordered that a writ of partition do issue, directed to certain commissioners and that they make their return to the next court," (at the ensuing November term, there was no court.) 3. At April term, 1829, the following entry: "J. Patterson and wife, and others, v. Jesse Smith, adm'r., ordered that a writ of partition do issue," appointing Benjamin Gause and others commissioners, who were not entirely the same persons named before. (Mr. Holt, the attorney, deposed that there were two motions and orders for writs of partition relating to the same land, but that there was only one summons.) 4. At Spring term, 1831, an order for extending the time to make return. The following final order was made at Fall term, 1831: "John Patterson and wife v. Mercy Smith et al. The commissioners having made their return recommending a sale of the premises, ordered that the same be confirmed, and that the sheriff do sell the premises," &c. (specifying the time and terms.) It was further proved by a witness present, that the land was sold and bid off by the plaintiff; and by *Todd*, one of the commissioners, that they went upon the land, were at the defendant's house, that he claimed the part he lived on as a gift from his father. That the commissioners valued the land and recommended a sale, including that portion claimed by the defendant, and that he, the witness, *returned* the proceedings to the clerk's office. HELD competent and sufficient evidence of title in the plaintiff. *Smith v. Smith.* 332.

11. It may be questioned whether it was necessary for the plaintiff to produce in this case more than the final order of the court, on the coming in of the commissioners return, for the sale of the premises. *Ibid.*

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12. Although the proceedings for partition are to be regarded to all intents and purposes as *a suit*, yet under the act giving jurisdiction at law, and the practice upon it, the plaintiffs or claimants are not required to *declare*, unless the defendant appear and resists the partition. In that case an issue becomes necessary, and the plaintiff must declare. *Ibid.*
13. In this case the defendant having been served with the *summons*, had an opportunity of setting up his title and making defence; he was called upon to show cause why the partition should not be made of the premises, as the estate of *Jesse Smith*, deceased. It was a suit involving his title to the land, and he cannot *now* be allowed to make the defence which he omitted to make then. The order for the sale is conclusive as the judgment of a court upon the same subject matter and between the same parties. His defence should have been made before the writ of partition was ordered to issue. *Ibid.*
14. Where in proceedings in partition an apparent chasm of two years appeared to exist between the order directing the writ to issue and an order allowing further time to the commissioners to make their return, the court would not consider it as affecting the validity of the *judgment*; whether the order for the writ of partition to issue, or the final order for the sale of the premises on the commissioners return, were to be regarded as the judgment. In either case, the final order confirming the return and ordering the sale, would be considered as curing any apparent irregularity in the previous proceedings. *Ibid.*
15. In the execution of a writ of *habere facias possessionem*, the sheriff should put the plaintiff into full possession; and to do this, he may put out not only the defendant, but all others, *it seems*, who are in possession. This he is authorised to do by the writ; but the *title* of no person is in any way affected, except that of the defendant and those who hold under him. *Johnson v. M'Ilwain.*
16. One of the rules of *location* is, "that the line shall be run according to the boundary; and that the boundary is to be observed, although the course be different." In *Atkinson v. Anderson*, 3 M'Cord. R., 323, it was held, "that where a junior grant called for a senior as a boundary, the boundary should be followed, although it was a zigzag instead of a straight line,"—and in *Martin v. Simpson*, Harp. R., 455, it was decided "that where the boundary called for extends only along a part of the line, then the boundary is to be observed as far as it goes, and the balance of the line is to be run according to the course called for on the plat. *Ibid.*

TRIAL IN CRIMINAL CASES. See INDICTMENT, 1, 2, 3, 4, 5.

" **IN CIVIL CASES.** See PRACTICE.

TROVER.

1. Independently of the act of 1827, in relation to the action of trover, the doctrine in this State is well settled, "that a verdict for the plaintiff, in trover, changes the property and transfers the *right* to the *defendant*, and makes it liable to be taken in execution for his debts."—*Rogers & Thompson v. Moore*. 60.
2. The leading case on this subject in this State, is that of *Norrel v. Corley*, decided by the late court of appeals in December, 1828, (not reported,) in which the opinion of the court was delivered by the late Mr. Justice Nott. That was a case in *chancery*, where a bill was filed by the plaintiff in trover, who had recovered at law, to make the property which was the subject of the action, liable to the plaintiff's recovery, in preference to other creditors. The court said "by bringing an action of trover, the plaintiff trusts to the personal credit of the defendant, in the same manner as by taking a note or bond in payment of property sold: the property is changed, even though the money should never be recovered." *Ibid*.
3. The trover act of 1827, is not a declaratory act. The very title of the act, (which is "an act to *alter* the law in relation to trover,") shows conclusively that the legislature supposed the law to be otherwise before, and the whole tenor of the first and important section demonstrates, that the purpose was to provide a *new* remedy in actions *afterwards to be* commenced. The act therefore does not apply to an action of trover commenced *before* the passing of the act. *Ibid*.
4. In an action of assumpsit for the price of two negro slaves, alleged to have been sold by the plaintiff to the defendant, it appeared that the plaintiff had, previously to the bringing of this suit, brought an action of trover against the defendant for the same negroes, in which the jury had found a verdict for the defendant. The sale upon which the plaintiff relied in this case, appeared to have been made before the action of trover was commenced. HELD, that the former recovery in trover by the defendant, was no *bar* to this action; and the jury having found for the plaintiff, the court refused to grant a new trial. [EARLE and BUTLER, Justices, dissenting—on the ground of the incompleteness of the evidence of sale, and on the fact that the plaintiff had brought trover for the same negroes, thereby disavowing a contract of sale.] *Robertson v. Montgomery*. 87.
5. The carriers right of *lien* for freight, is only co-extensive with his legal right of action, and as under our discount act the owner may show in avoidance of his claim to recover freight, that the goods were damaged in their transportation, through the fault of the carrier, it follows that the lien of the carrier must be liable to be defeated in the same way. *Ewarts v. Kerr*. 223.
6. "Where there is no debt there is no lien,"—and if it can be shown that the carrier has injured the goods of the shippers by his own fault, to a greater amount than his whole freight, it cannot be pre-

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tended that they owe him any thing; and hence the owner may maintain *trover* against the carrier for the goods which he detains in such a case, on his supposed claim to freight, and refuses to deliver. [EARLE and RICHARDSON, Justices, dissenting.] *Ibid.*

7. Under the trover act of 1827, it is not essential that the affidavit required by that act should be made by the *plaintiff*. The affidavit of a *third person* is equally competent; and in the case of a free person of color plaintiff, is proper and sufficient. *Chartran v. Schmidt*. 229.
8. An administrator who has never had possession of the goods of his intestate, may notwithstanding maintain trover *in his own name*, for a conversion of such goods after the death of the intestate. *Kerby v. Quinn*. 264.
9. The general rule is, that the owner of a chattel *entitled to immediate possession*, may maintain trover against a wrong doer; the legal effect of granting administration, is to vest in the administrator the *legal estate*, in all the intestate's personal property, and this has relation back to the death of the intestate. He is the legal owner, the letters of administration are the evidence of his title, and hence for a conversion in *his own time*, he must always produce and give in evidence the letters of administration. (S. P. Browning v. Huff, 2 Bail. 174.) *Ibid.*
10. In such a case it is not necessary or proper that he should sue in his representative character, or style himself *administrator*. *Ibid.*
11. Trover for negroes. The intestate, Mary Hill, had had the negroes in her possession for thirty years. For the years 1834 and 1835, the defendant, Brennan, hired the negroes from her. In 1836, after the term of hiring had expired, the negroes were demanded, and Brennan refused to return them. Mary Hill, the plaintiff's intestate, took out letters of administration on the estate of her husband, John Hill, who had been dead thirty years, and returned these negroes as a part of his estate. In the fall of the same year, Mrs. Hill died; Brennan kept possession until about Christmas, when the negroes were taken out of his possession by some of the distributees, and were sold for a division, in January. The plaintiff, as the administrator of Mary Hill, brought an action of trover against Brennan, in which he claimed the hire of the negroes for the year 1836. HELD, that by hiring the negroes from Mrs. Hill, the defendant acknowledged her title, and could dispute it only by showing that she had parted from her title to him, or some other person; that on his refusal to deliver the negroes, she had a right to sue him, that this cause of action descended to her administrator, the plaintiff, and that the circumstance that she afterward took out letters of administration on John Hill's estate, and inventoried these negroes as a part of his estate, did not vary the case. *Hill v. Brennan*. 285.

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12. An *administrator* is the *legal* owner of the goods of the intestate, by relation, from the death of the latter, and may maintain trover for a conversion of the goods, since the intestate's death, in his or her *own* name. (S. P. Kerby v. Quinn, ante. p. 264.) *Ibid.*

See SLAVES, 1.

WARRANTY. See SALE OF LANDS AND CHATTELS, 1, 2, 3.

WAY.

Action on the case for obstructing a right of way. In 1835, the plaintiff had recovered by verdict and judgment, a right of way in the general course of the private road claimed in this action. The complaint was, that the defendant had dug a ditch and thrown up a bank which obstructed the way. The recovery referred to did not describe the way, except by finding the "river road" for the plaintiff. One witness for the plaintiff deposed "that the road had been for about thirty years, along the bluff of the river. That after the recovery (spoken of), the witness, together with *Chaplin* and *Adams*, placed a line of stakes thirty feet from the river bank, (intended for the river side of the road,) and allowed eighteen or twenty feet outside the stakes for the road. They meant to lay out a sufficient way as the river successively washes the bluff and encroaches on the road. That there were two places where the old track ran outside the stakes, and there were spots where the bluff had encroached upon the old track; as it washes fast, they allowed some space for its washing. That it had not washed much since the stakes were put down. That since the stakes were put down a ditch had been dug and dam made, (no doubt) by the defendant. The ditch runs about eighteen feet from the bluff, and in one part, (where there is a wash,) about twelve feet only. This ditch cuts a small part of the *old track* off the road, but there the space is wide. The ditch runs sometimes within his line of stakes and at others out of it." The defence set up was, that after the recovery, the defendant allowed at least twenty feet from the bluff for the plaintiff's way, and that he had cut the ditch to keep the road within that space. That if it had been diminished by the river, the plaintiff had to bear the loss, on the ground that a private road must be repaired by the owner. One *John Edwards*, on the part of the defendant, deposed, "that after *James Fripp*, *Chaplin* and *Adams*, had put down their stakes, he cut the ditch, &c., for the defendant, in December, 1836. That the ditch left twenty-six or twenty-seven feet space for the road, but that it had been lessened in breadth by washing. That it was now thirteen feet at the wash and was safe enough. He did not think the ditch encroached upon the old track or stakes. Another witness stated "that the ditch encroached upon the old track, (as it stood before the recovery by the plaintiff,) but still leaves that spot wide; that the river washed away

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the narrow spot (the wash) more than a foot last year, and that the bluff had neared the ditch about two feet since it was dug." Upon this evidence, the judge below instructed the jury "that by the former recovery, the plaintiff was entitled to a certain *specific way* and no more. That it was not a *shifting way*, nor a road claimed from necessity. That the difficulty was to perceive what particular way he had recovered. There were no marked lines, stations, points, or corners, by which the court could lay down a rule for locating the precise line or route of the road, only the *river road*. But that from the recovery, the plaintiff had clearly a right of way along the river, which it did not appear had been washed off. If it had, then the plaintiff might have claimed some way or other, but that at present they had nothing to do with such a question. That if the defendant had adopted the route laid out by James Fripp, or the plaintiff the line ditched by John Edwards, the way might have been plain. That as the case stood, if the defendant had obstructed the old road actually recovered, he must pay damages for the obstruction; if he had not, the verdict must be for him; whether the river had encroached upon the old track or not, did not affect the question. That he who used the way, must repair it, or bear the inconvenience—and he who obstructed it, must pay damages." The jury found a verdict for the plaintiff for \$200 damages, and the court refused to grant a new trial. *Capers v. Fripp*. 225.

WILL. See ORDINARY, 1, 2, 4, 5, 6, 7, 8. NEW TRIAL, 2, 3, 4, 5.—
BILLS AND NOTES, 11. GIFT, 1, 2, 3.



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